

COMMISSION ON POLICE PRACTICES

Wednesday, May 15, 2024

4:30pm-7:30pm

**REGULAR BUSINESS MEETING
AND AD HOC PERSONNEL COMMITTEE
JOINT MEETING AGENDA**

**Balboa Park Santa Fe Room
2144 Pan American W. Road
San Diego, CA 92101**

Commissioners: Octavio Aguilar, John Armantrout, Bonnie Benitez, Alec Beyer, Dennis W. Brown, Cheryl Canson, Doug Case, Stephen Chatzky, Armando Flores, Christina Griffin-Jones, Dwayne Harvey, Brandon Hilpert, Daniel Mendoza, Darlanne Mulmat, Clovis Honoré, James Justus, Lupe Lozano-Diaz, Ada Rodriguez, Yvania Rubio, and Gloria Tran

Ad Hoc Personnel Committee: Dennis Brown, Clovis Honoré, James Justus, Darlanne Mulmat

Please be advised that the City of San Diego is presently engaged in a recruitment process to fill the position of Executive Director to the Commission on Police Practices (Commission), which is currently held by an interim director. The Commission does not have appointing authority or subject matter jurisdiction over the recruitment or appointment of the Executive Director. Under San Diego City Charter section 41.2, the City Council must appoint and establish the initial annual compensation for the Commission's' Executive Director, who will then serve at the direction and will of the Commission following appointment. To recruit and make advisory recommendations related to the selection of an Executive Director, the City Council has established an Ad Hoc Committee that includes two Councilmembers and four members of the Commission. See San Diego Resolution R-315326 (Jan. 29, 2024). The public may find information and meeting notices related to the work of the Ad Hoc Committee at the following links:

https://docs.sandiego.gov/council_reso_ordinance/rao2024/R-315326.pdf

<https://www.sandiego.gov/council-committees/ah-cpp-recruitment-committee-public-comment-form>

The Ad Hoc Personnel Committee Meeting shall only jointly convene where all four commissioners of the committee are in attendance. If the Ad Hoc Personnel meeting is not convened, there will be no discussion or update at the meeting regarding the Executive Director selection or recruitment. No formal action may be taken by the Commission or the Personnel Committee regarding the Executive Director selection pursuant to the City Charter.

Staff: Outside Counsel Duane Bennett, Interim Executive Director Danell Scarborough, Executive Assistant Alina Conde, Administrative Assistant Jon'Nae McFarland, Community Engagement Coordinator Yasmeen Obeid

The Commission on Police Practices (Commission) meetings will be conducted pursuant to the provisions of California Government Code Section 54953 (a), as amended by Assembly Bill 2249.

The Commission business meetings will be in person and the meeting will be open for in-person testimony. Additionally, we are continuing to provide alternatives to in-person attendance for participating in our meetings. In lieu of in-person attendance, members of the public may also participate via telephone/Zoom.

The link to join the meeting by computer, tablet, or smartphone at 4:30pm is:

<https://sandiego.zoomgov.com/j/1600970427>

Meeting ID: 160 097 0427

In-Person Public Comment on an Agenda Item: If you wish to address the Commission on an item on today's agenda, please complete and submit a speaker slip before the Commission hears the agenda item. You will be called at the time the item is heard. Each speaker must file a speaker slip with the Executive Director at the meeting at which the speaker wishes to speak indicating which item they wish to speak on. Speaker slips may not be turned in prior to the day of the meeting or after completion of in-person testimony. In-person public comment will conclude before virtual testimony begins. Each speaker who wishes to address the Commission must state who they are representing if they represent an organization or another person.

For discussion and information items each speaker may speak up to three (3) minutes, subject to the Chair's determination of the time available for meeting management purposes, in addition to any time ceded by other members of the public who are present at the meeting and have submitted a speaker slip ceding their time. These speaker slips should be submitted together at one time to the Executive Director. The Chair may also limit organized group presentations of five or more people to 15 minutes or less.

In-Person Public Comment on Matters Not on the Agenda: You may address the Commission on any matter not listed on today's agenda. Please complete and submit a speaker slip. However, California's open meeting laws do not permit the Commission to discuss or take any action on the matter at today's meeting. At its discretion, the Commission may add the item to a future meeting agenda or refer

the matter to staff or committee. Public comments are limited to three minutes per speaker. At the discretion of the Chair, if a large number of people wish to speak on the same item, comments may be limited to a set period of time per item to appropriately manage the meeting and ensure the Commission has time to consider all the agenda items. A member of the public may only provide one comment per agenda item. In-person public comment on items not on the agenda will conclude before virtual testimony begins.

Virtual Platform Public Comment to a Particular Item or Matters Not on the Agenda: When the Chair introduces the item you would like to comment on (or indicates it is time for Non-Agenda Public Comment), raise your hand by either tapping the “Raise Your Hand” button on your computer, tablet, or Smartphone, or by dialing *9 on your phone. You will be taken in the order in which you raised your hand. You may only speak once on a particular item. When the Chair indicates it is your turn to speak, click the unmute prompt that will appear on your computer, tablet or Smartphone, or dial *6 on your phone. The virtual queue will close when the last virtual speaker finishes speaking or 5 minutes after in-person testimony ends, whichever happens first.

Written Comment through Webform: Comment on agenda items and non-agenda public comment may also be submitted using the [webform](#). If using the webform, indicate the agenda item number you wish to submit a comment for. All webform comments are limited to 200 words. On the [webform](#), members of the public should select Commission on Police Practices (even if the public comment is for a Commission on Police Practices Committee meeting).

The public may attend a meeting when scheduled by following the attendee meeting link provided above. To view a meeting archive video, click [here](#). Video footage of each Commission meeting is posted online [here](#) within 24-48 hours of the conclusion of the meeting.

Comments received no later than 11am the day of the meeting will be distributed to the Commission on Police Practices. Comments received after the deadline described above but before the item is called will be submitted into the written record for the relevant item.

Written Materials: You may alternatively submit via U.S. Mail to Attn: Office of the Commission on Police Practices, 525 B Street, Suite 1725, San Diego, CA 92101. Materials submitted via U.S. Mail must be received the business day prior to the meeting to be distributed to the Commission on Police Practices.

If you attach any documents to your comment, they will be distributed to the Commission or Committee in accordance with the deadlines described above.

- I. CALL TO ORDER/WELCOME (Chair Tran)
 - A. Chair Report

- II. CPP COMMISSION ROLL CALL (Executive Assistant Conde)
 - A. AD HOC Personnel Committee Roll Call

- III. PURPOSE OF THE COMMISSION ON POLICE PRACTICES
 The purpose of the Commission on Police Practices (CPP or Commission) is to provide independent community oversight of SDPD, directed at increasing community trust in SDPD & increasing safety for community and officers. The purpose of the Commission is also to perform independent investigations of officer-involved shootings, in-custody deaths and other significant incidents, and an unbiased evaluation of all complaints against members of SDPD and its personnel in a process that will be transparent and accountable to the community. Lastly, the Commission also evaluates the review of all SDPD policies, practices, trainings, and protocols and represents the community in making recommendations for changes.

- IV. APPROVAL OF MEETING MINUTES (Chair Tran)
 - A. CPP Regular Meeting Minutes of May 1, 2024

- V. NON-AGENDA PUBLIC COMMENT (Community Engagement Coordinator Yasmeen Obeid)

- VI. SAN DIEGO POLICE PROTEST POLICY
 - A. SDPD’s First Amendment Activity Facilitation and Management (Executive Assistant Chief Paul Connelly)
 - B. Interim CPP Recommendations (Commissioner Hilpert)
 - C. Public Comment
 - D. Discussion
 - E. Action—Vote to potentially send recommendations to Police Department

- VII. Executive Director Hiring Update (1st Vice Chair Brown)
 - A. Presentation
 - B. Public Comment
 - C. Discussion

- VIII. PARALEGAL INTRODUCTION (Outside Counsel Duane Bennett)
 - A. Joseph Comstock and Judith Ezeh
 - B. Public Comment
 - C. Discussion

- IX. POLICE PURSUIT AD HOC COMMITTEE (Chair Tran and Ad Hoc Committee Chair Case)
 - A. Ad Hoc Committee Update
 - 1. Presentation—Update Ad Hoc Committee work
 - 2. Public Comment
 - 3. Discussion

- X. AD HOC NOMINATING COMMITTEE (Chair Tran)
 - A. Per bylaws, 3 Commissioners form Nominating Committee
 - B. Public Comment
 - C. Discussion
 - D. Action—Vote on Nominating Committee members

XI. AD HOC OPERATING PROCEDURES (Ad Hoc Committee Chair Case)

A. Presentation:

1. Complaint procedure
2. Subpoenas
3. Pitchess Motions/Police Discovery

B. Public Comment

C. Discussion

D. Action—Vote to approve each procedure separately

XII. CLOSED SESSION

A. Public comment

B. Outside Counsel Duane Bennett – Lead CPP into Closed Session
(Not Open to the Public)

C. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

Discussion & Consideration of Complaints & Reports: Pursuant to Government Code Section 54957 to discuss complaints, charges, investigations, and discipline (unless the employee requests an open public session) involving San Diego Police Department employees, and information deemed confidential under Penal Code Sections 832.5–832.8 and Evidence Code Section 1040. Reportable actions for the Closed Session items on the agenda will be announced and posted on the Commission’s website at www.sandiego.gov/cpp.

- I. San Diego Police Department Feedback on Case Specific Matters (0)
- II. Shooting Review Board Reports (0)
- III. Officer-Involved Shooting (0)
- IV. Category II Case Audit Reports (0)
- V. Discipline Reports (2)
- VI. Case Review Team Reports (3)
- VII. Case-Specific Recommendations to the Mayor/Chief (0)
- VIII. Referrals to other governmental agencies authorized to investigate activities of a law enforcement agency (0)

XIII. REPORT FROM CLOSED SESSION (Outside Counsel Duane Bennett)

XIV. THANK YOU, AMAZING INTERNS! (Community Engagement Coordinator Yasmeen Obeid and Executive Assistant Alina Conde)

- A. Ayan Mohamed
- B. Tomas Moshi
- C. Maria Jaramillo Pacheco
- D. Ezra Skerlecz

XV. COMMISSIONER COMMENTS (Time Permitting)

XVI. ADJOURNMENT

Materials Provided:

- DRAFT Minutes from Regular Meeting on May 1, 2024
- SDPD Procedure 4.17 – First Amendment Activity Facilitation and Management
- CPP Memo 3/30/2021
- SDPD Response 5/25/2021
- CPP ED Hiring Process and Next Steps
- CPP Complaint Administration Procedure DRAFT
- Pitchess Motions and Police Discovery Procedures DRAFT

Access for People with Disabilities: As required by the Americans with Disabilities Act (ADA), requests for agenda information to be made available in alternative formats, and any requests for disability-related modifications or accommodations required to facilitate meeting participation, including requests for alternatives to observing meetings and offering public comment as noted above, may be made by contacting the Commission at (619) 236-6296 or commissionpolicepractices@sandiego.gov.

Requests for disability-related modifications or accommodations required to facilitate meeting participation, including requests for auxiliary aids, services, or interpreters, require different lead times, ranging from five business days to two weeks. Please keep this in mind and provide as much advance notice as possible to ensure availability. The city is committed to resolving accessibility requests swiftly to maximize accessibility.

Commission on Police Practices

**COMMISSION ON POLICE PRACTICES
REGULAR MEETING REGULAR BUSINESS MEETING
AND AD HOC PERSONNEL COMMITTEE
JOINT MEETING MINUTES**

Wednesday, May 1, 2024

4:30pm-7:30pm

**Balboa Park Santa Fe Room
2144 Pan American W. Road
San Diego, CA 92101**

Click <https://www.youtube.com/watch?v=Se6ks4JQNXI> to view this meeting on YouTube.

CPP Commissioners Present:

Chair Gloria Tran
1st Vice Chair Dennis Brown
2nd Vice Chair Doug Case
John Armantrout
Bonnie Benitez
Alec Beyer
Cheryl Canson
Stephen Chatzky
Lupe Diaz (arrived at 4:38 pm)

Armando Flores
Christina Griffin-Jones
Dwayne Harvey (arrived at 4:44 pm)
Brandon Hilpert
Clovis Honoré
James Justus
Darlanne Mulmat
Ada Rodriguez
Yvania Rubio

Excused:

Octavio Aguilar

Absent:

Laila Aziz
Dennis Larkin

Ad Hoc Personnel Committee Present:

Committee Chair, 1st Vice Chair Dennis Brown
Clovis Honoré
James Justus
Darlanne Mulmat

CPP Staff Present:

Danell Scarborough, Interim Executive Director
Duane Bennett, CPP Outside Counsel
Yasmeen Obeid, Community Engagement Coordinator
Alina Conde, Executive Assistant
Jon'Nae McFarland, Administrative Aide

- I. CALL TO ORDER/WELCOME: Chair Gloria Tran called the meeting to order at 4:29 pm, once a quorum was formed.
 - There are 6 seats open for the Commission on Police Practices, as some terms end on June 30, 2024. The seats are: 2 for the Low- and Moderate-Income, 2 Youth, 1 At Large seat, and Council District 8 commissioner. Please submit all nominations directly and only to applytocpp@sandiego.gov by Monday, June 3, 2024, at 11:59 p.m. for consideration.
 - If Commissioners would like to request information from the Police Department or staff, CPP protocol is to make the requests by emailing the Executive Director and Chair.
 - The CPP is considering a date in June or July for next Community Hearing, which will focus on Pretext Stops. Once a date is confirmed, it will be announced.

- II. ROLL CALL: Executive Assistant Alina Conde conducted the roll call for the Commission; established quorum.
 - A. Executive Assistant Alina Conde conducted roll call for the Ad Hoc Personnel Committee.

- III. PURPOSE OF THE COMMISSION ON POLICE PRACTICES: The purpose of the Commission on Police Practices (CPP or Commission) is to provide independent community oversight of SDPD, directed at increasing community trust in SDPD & increasing safety for community and officers. The purpose of the Commission is also to perform independent investigations of officer-involved shootings, in-custody deaths and other significant incidents, and an unbiased evaluation of all complaints against members of SDPD and its personnel in a process that will be transparent and accountable to the community. Lastly, the Commission also evaluates the review of all SDPD policies, practices, trainings, and protocols and represents the community in making recommendations for changes.

- IV. APPROVAL OF MEETING MINUTES
 - A. CPP Regular Meeting Minutes of April 17, 2024
 1. **Motion:** Commissioner James Justus moved for approval of the CPP Regular Meeting Minutes of April 17, 2024. Commissioner Alec Beyer seconded the motion. The motion passed with a vote of 16-0-0.
 Yays: Chair Tran, 1st Vice Chair Brown, 2nd Vice Chair Case, Aguilar, Armantrout, Benitez, Beyer, Canson, Flores, Chatzky, Griffin-Jones, Honoré, Hilpert, Mulmat, Rodriguez, and Rubio
 Nays: 0
 Abstained: 0
 Absent/Excused/Arrived Late: Aziz, Diaz, Harvey, Larkin

- V. NON-AGENDA PUBLIC COMMENT: None

- VI. COMMISSIONER ABSENCES
 - A. City Ordinance and CPP Bylaws
 1. Staff Report – Steps taken to encourage attendance (*Timestamp 6:16*)
 - B. Public Comment - None
 - C. Discussion - (*Timestamp 9:44*)
 - D. Vote on a process to address unexcused absences of commissioners and/or implementation of a process to remove commissioners pursuant to SDMC section

26.1106(c)(5)

Motion: Chair Gloria Tran moved to approve a process, as outlined in the staff report, to address unexcused absences of commissioners and implementation of a process to remove commissioners pursuant to SDMC section 26.1106(c)(5). Commissioner James Justus seconded the motion. The motion passed with a vote of 16-1-1.

Yays: Chair Tran, 1st Vice Chair Brown, 2nd Vice Chair Case, Aguilar, Armantrout, Benitez, Canson, Diaz, Flores, Chatzky, Diaz, Griffin-Jones, Hilpert, Mulmat, Rodriguez, and Rubio

Nays: Beyer

Abstained: Honoré

Absent/Excused/Arrived Late: Aziz, Harvey, Larkin

VII. POLICE PURSUIT AD HOC COMMITTEE

A. Ad Hoc Committee Update -

1. Presentation - (*Timestamp 13:10*) Ad Hoc Committee Chair Doug Case gave an update on the progress of the committee's action plan.
2. Public Comment - None
3. Discussion (*Timestamp 16:53*)

VIII. PERT TRAINING

A. Introduce Speakers

1. Mark W. Marvin, Ph.D., CRF VP - PERT Division
2. Wes Albers, Law Enforcement/Community Liaison

B. Presentation: (*Timestamp 29:02*) Psychiatric Emergency Response Team (PERT): what they do and how they operate.

C. Public Comment - None

D. Discussion (*Timestamp 56:05*)

IX. CLOSED SESSION (NOT OPEN TO THE PUBLIC)

A. Public Comment - None

B. Outside Counsel Mr. Duane Bennett - Led CPP into Closed Session

C. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

Discussion & Consideration of Complaints & Reports: Pursuant to Government Code Section 54957 to discuss complaints, charges, investigations, and discipline (unless the employee requests an open public session) involving San Diego Police Department employees, and information deemed confidential under Penal Code Sections 832.5-832.8 and Evidence Code Section 1040. Reportable actions for the Closed Session items on the agenda will be posted on the Commission's website at www.sandiego.gov/cpp or stated at the beginning of the Open Session meeting if the meeting is held on the same day.

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| <ol style="list-style-type: none">I. San Diego Police Department Feedback on Case Specific MattersII. Officer Involved Shooting (0)III. Category II Case Audit Reports (2)IV. Discipline Reports (0)V. Category I Case Review Reports (1)VI. Case-Specific Recommendations to the Mayor/Chief (0)VII. Referrals to other governmental agencies authorized to investigate activities of a law enforcement agency (0)VIII. Legal Opinion(s) Request & Response (0) |
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- X. REPORT OUT FROM CLOSED SESSION (7:18pm): Outside Counsel Duane Bennett reported that there was no reportable action.
- XI. COMMISSIONER COMMENTS:
- Commissioner Yvania Rubio (*Timestamp 1:51:28*) requested putting the SDPD policy involving protests on the agenda.
 - Commissioner Christina Griffin-Jones (*Timestamp 1:52:30*) UCSD campus students participating in an action are expressing concerns regarding police.
- XII. ADJOURNMENT: The meeting adjourned at 7:21 pm.

**SAN DIEGO POLICE DEPARTMENT
PROCEDURE**

DATE: AUGUST 17, 2022

NUMBER: 4.17 – LEGAL

SUBJECT: FIRST AMENDMENT ACTIVITY FACILITATION AND
MANAGEMENT

RELATED POLICY: N/A

ORIGINATING DIVISION: CRITICAL INCIDENT MANAGEMENT UNIT

NEW PROCEDURE:

PROCEDURAL CHANGE: **MAJOR CHANGES**

SUPERSEDES: DP 4.17 - 02/17/2021

I. PURPOSE

This Department procedure establishes guidelines for the coordination, facilitation and management of First Amendment Activities.

II. SCOPE

This procedure applies to all members of the Department.

III. BACKGROUND

The First Amendment to the Constitution of the United States of America states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Article 1, sections 1 through 3, of the California Constitution also guarantees the rights to life, liberty, acquiring and possessing property, pursuing safety, happiness, and privacy, as well as the rights to speak freely, to freedom of the press, to petition the government for redress of grievances, and to assemble freely to consult for the common good.

The San Diego Police Department supports all people's fundamental right to peaceably assemble and their right to freedom of speech and expression.

The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.

In furtherance of these rights, and to facilitate the safe and peaceful exercise of an individual or group's First Amendment rights, the Department will act swiftly and with resolve to protect human life, property, and maintain peace when confronted with violence, threats of violence, assaults, or other criminal acts.

IV. DEFINITIONS

- A. Authorized News Media – representatives are those persons possessing current, valid credentials issued by SDPD or any bona fide law enforcement agency, or other identification establishing regular news media affiliation or employment. (DP 1.30 & 8.09)
 - 1. "Freelance" reporters or photographers possessing a valid San Diego Police Department media credential will be deemed as authorized news media representatives, or other identification establishing regular news media affiliation or employment. (DP 8.09)
- B. Crowd Control - Crowd control is defined as those techniques used to address unlawful public assemblies, including crowd containment or movement, dispersal tactics, and arrests.
- C. Crowd Management - Techniques used to manage public assemblies before, during, and after an event, to maintain public safety, preserve the peace, prevent criminal activity, and facilitate the event's lawful status.
- D. Designee - A Designee is a Department member designated by the Incident Commander to carry out a specific task. The Incident Commanders may delegate their authority, but not their responsibility.
- E. First Amendment Activity/Activities - First Amendment Activities include all forms of speech and expressive conduct used to convey ideas or information, express grievances, or otherwise communicate with others, including verbal and non-verbal expression. First Amendment Activities may include public displays of a group's or individual's feeling(s) toward a person(s), idea, or cause, and includes, but is not limited to, marches, protests, student walkouts, assemblies, and sit-ins. Such events and activities usually attract a crowd of persons, including participants, onlookers, observers, media, and other persons who may agree or disagree with the activity's point of view.
 - 1. Common First Amendment Activities include, but are not limited to, speeches, demonstrations, vigils, picketing, distribution of literature, displaying banners or signs, using puppets to convey a message, and other artistic forms of expression. These activities involve the freedom of

speech, association, assembly, and the right to petition the government, as guaranteed by the United States Constitution and the California Constitution.

2. All persons have the right to peacefully march, demonstrate, protest, rally, or perform the other activities protected by the First Amendment of the United States Constitution and California Constitution.
 3. The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are content-neutral, without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.
- F. Incident Commander - The Incident Commander is responsible for all incident/event activities. The Incident Commander should be of the rank appropriate for the event. The Incident Commander may change throughout an evolving incident.
- G. Lawful Assembly - A First Amendment Activity, involving two or more persons, which abides by relevant statutory laws and does not involve violence or criminal acts.
- H. Riot - Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by the immediate power of execution, by two or more persons acting together, and without the authority of law, is a Riot. (404 PC)
- I. Rout - Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a Rout. (406 PC)
- J. Supplemental Video Team (SVT) – The Supplemental Video Team is a resource available to the Incident Commander during First Amendment Activity covered under this procedure. The SVT will consist of personnel from the Media Services Unit. The objective will be to use video cameras to capture images, video and audio recordings to supplement information captured from officers’ Body Worn Cameras (BWCs). The SVT will adhere to Department Procedure 3.26 - Media Evidence Recovery and Impounding/Preserving Procedures.
- K. Unified Command - Unified Command is a procedure that allows all agencies with the significant geographical, legal or functional responsibility over an incident to avoid operational conflicts, economize resources by collocating at a single Incident Command Post or communicate their operational goals and strategies to each other during structured planning meetings.
- L. Unlawful Assembly - Whenever two or more persons assemble to do an unlawful act or do a lawful act in a violent, boisterous, or tumultuous manner, such

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assembly is an Unlawful Assembly. (407 PC) This section applies to assemblies which are violent, or which pose a clear and present danger of imminent violence. Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is “boisterous or tumultuous” does not establish a violation of the statute.

V. PLANNING FOR FIRST AMENDMENT ACTIVITIES:

A. Pre-planned events

1. When appropriate, and consistent with Department Procedure, 8.04, the Incident Commander shall be responsible for developing a written contingency or incident action plan, consistent with the Department’s goals and objectives to minimize harm, honor constitutional rights, communicate with the event participants, and facilitate First Amendment Activity. This plan may be in a Department Memorandum format or the ICS 201 format. All or parts of the contingency or incident action plan may be exempt from public disclosure pursuant to the California Public Records Act. Each plan shall be marked accordingly.
2. The Incident Command System shall be appropriately used when managing First Amendment events.
3. The Incident Commander or designee shall immediately notify the affected Service Area Lieutenant and Division Captain of potential First Amendment Activities.
4. Consider engaging allied agencies (CHP, SDSO, Fire-Rescue etc.) if the First Amendment Activity could likely affect other jurisdictions or if assistance may become necessary.
5. Stakeholder involvement is essential to the overall success of managing First Amendment Activities. When knowledge exists that a First Amendment Activity may occur, the Incident Commander or designee shall proactively make reasonable attempts to establish and maintain communication and cooperation with representatives or the First Amendment Activity leaders.
6. If communication is established, the Incident Commander or designee shall make reasonable efforts to identify the event's representatives or leaders and identify a primary police liaison. The primary police liaison should be requested to be in continuous contact with an assigned police representative designated by the Incident Commander.
7. In planning for First Amendment Activity, Incident Commanders, or their designees, should consider the following factors in determining the appropriate resources and level of preparation necessary:

- a. What type of First Amendment Activity is expected to occur? (Press conference, demonstration, protests, static event, labor strike, picket line, march, caravan, sit-in/dine-in, etc.)
- b. What is the goal of the First Amendment Activity? (Raise awareness, disrupt a target location, counter another demonstration, engage in criminal activity, etc.)
- c. When will the First Amendment Activity occur? (Day of the week, holiday, time of day/traffic patterns, daytime/nighttime, conflict with other events at the same time.)
- d. Will there be an organizing individual/group, or will this be a crowd without identified leadership?
- e. Has the Department previously worked with the organizers? Have prior First Amendment Activities been lawful ?
- f. Where will the First Amendment Activity likely occur? Will the event affect critical infrastructure like police stations, jails, courthouses, freeways, government buildings, etc.? Will the effect be deliberate or collateral?
- g. If the group intends to be mobile, what will the predicted or planned route(s) be? (First Amendment Activity participants may not provide their own traffic control.)
- h. What will be the projected size of the First Amendment Activity event?
- i. What will the composition of the group be? (Juveniles, students, labor unions, known local groups, known groups from outside the area, unified as to a single cause, or diverse causes and points of view within the group, etc.)
- j. Will the hosting group provide its own marshals or monitors?
- k. Will an opposing group attend the First Amendment Activity event?
- l. Is there a likelihood of improvised or conventional weapons?
- m. Are arrests likely? Will prisoner processing be necessary?
- n. Is civil disobedience planned or likely?
- o. Is unlawful assembly planned or likely?
- p. Is riot planned or likely?

8. The operations plan created to address a First Amendment Activity event should anticipate various scenarios and devise a police contingency plan. All plans shall include de-escalation considerations in compliance with Department Procedure 1.55.
9. The Incident Commander shall balance any anticipated level of disruption to traffic against the goal of facilitating First Amendment Activity, including the practicality of relegating the crowd to sidewalks or an alternate route, the expected duration of the disruption, and the traffic disruption expected in making a mass arrest if demonstrators refuse to leave the street. This balancing does not mean First Amendment Activity participants will be allowed to disrupt commuter traffic and bridge approaches deliberately.
10. Department-Issued ID Only Name Tags
 - a. ID only name tags may only be worn during a Mobile Field Force (MFF) event with Incident Commander approval, consistent with Department Procedure 5.10.

B. Spontaneous Events

1. Spontaneous First Amendment Activities, which occur without prior planning or prior notice to the police, present less opportunity for planning and mitigation efforts. The same policies and procedures concerning crowd management, crowd control, and police responses to criminal activity described below apply to a spontaneous First Amendment Activity.
2. Unless unavailable, a supervisor shall respond to the scene of spontaneous events and assume the role of Incident Commander until relieved by a ranking officer.
3. The Incident Commander shall notify the Watch Commander and, if appropriate, the Service Area Lieutenant.
4. An immediate assessment of the situation is essential for an effective police response. The Incident Commander should evaluate the spontaneous First Amendment Activity using the factors listed above for planned events.

VI. LAWFUL ASSEMBLY, DEMONSTRATION OR PROTEST

- A. The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.

- B. Officers shall remain professional when exposed to the content of the opinions being expressed regardless of the race, gender, sexual orientation, physical disabilities, appearances, or affiliation of anyone exercising their lawful rights. Officers shall be courteous in compliance with Department Policy 9.20.
- C. During peaceful First Amendment Activity, officers may find the occasional individual who engages in criminal conduct that is not reflective of the larger group. In these cases, when feasible, officers should address the individual offender in compliance with other Department procedures while minimally disrupting the larger assembly.

VII. UNLAWFUL ASSEMBLY

- A. An unlawful assembly is defined by California Penal Code 407 as "Whenever two or more persons assemble together to do an unlawful act or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly."
- B. When First Amendment Activity results in unlawful acts or violence, the Incident Commander shall consider the following in determining whether to declare the assembly unlawful:
 - 1. The threat to people or property.
 - 2. The number and nature of unlawful acts within the crowd.
 - 3. The number and nature of violent acts within the crowd.
 - 4. Whether the unlawful or violent acts result from one or two individuals or the larger crowd in general.
 - 5. Whether separate crowds have merged and now the group has internal conflict between participants.
 - 6. Whether contact with the police liaisons/event leaders to negotiate a resolution of the situation is appropriate and effective.
 - 7. Evaluation of whether arresting individuals will be more appropriate than dispersing the entire crowd.
 - 8. Determination if sufficient police resources are available on-scene to manage the incident effectively.
 - 9. The mere failure to obtain a permit, such as a parade permit or sound permit, is not a sufficient basis to declare an unlawful assembly.

10. The sole fact that some of the demonstrators or organizing groups have previously engaged in violent or unlawful acts is not grounds for declaring an assembly unlawful.

C. Declaration of Unlawful Assembly

1. If the Incident Commander deems it is appropriate to declare an unlawful assembly, dispersal orders must be given.
2. For a dispersal order to be valid, a public officer must direct the persons assembled to immediately disperse in the name of the People of the State. (726 PC) The officer is not required to use any particular words. However, the terms used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. Additionally, the officer must communicate the order in a reasonable way that ensures that the order is heard. (Judicial Council of California Criminal Jury Instructions 2020, Instruction Number 2686).
3. Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The Incident Commander should consider persons with mobility issues when evaluating ample means of egress. The dispersal order shall be given at least three (3) times, and when safe, with audible confirmation from officers behind the crowd.
4. The dispersal order shall be given in English and Spanish.
5. The Incident Commander should ensure video recording occurs during unlawful assemblies, consistent with Department Procedures 1.49 and 3.26.
6. Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.
7. Officers shall use the following dispersal order:

NEW

NEW

I am (your name and rank), a Police Officer of the City of San Diego. I hereby declare this to be an unlawful assembly, and in the name of the People of the State of California, I command all those assembled at (give specific location) to immediately disperse. You may move to (give a suitable location for crowd destination). If you do not do so, you will be arrested. If you refuse to move, (describe force, e.g. chemical agents and other weapons will be used. Provide the chemical agent/projectile warning only if their use is anticipated.)

Yo soy (name and rank) un oficial del departamento de policia de San Diego. Por Medio de la presente declaro que esta es una asamblea ilegal y en el nombre del gobierno del estado de California, les ordeno a todos aquellos reunidos (give specific location) que se retiren inmediatamente. Usted puede moverse (give specific locations and best route). Sino hacen eso, ustedes seran arrestados. Si usted rehusa moverse se usara gas lacrimojeno y otras armas. (Provide the chemical agent/projectile warning only if their use is anticipated.)

NEW

8. Incidents commanders shall consider the following methods that may be used to deliver and document dispersal orders (not in priority order):
 - a. Loud speech
 - b. Amplified sound
 - c. Ensuring that the order is heard in remote areas
 - d. Using unmanned aircraft equipped with amplified sound flown to inaccessible areas
 - e. Pre-recorded unlawful assembly messages in multiple languages as appropriate
 - f. Display of signage, including electronic signage and billboards, indicating unlawful assembly, dispersal and clearly identified routes of egress
 - g. Gaining the attention of the crowd and documenting affirmative responses of crowd members prior to the declaration of unlawful assembly
 - h. Positioning law enforcement personnel to the rear of a crowd to confirm and document hearing the transmission of the dispersal order
 - i. Acquiring multiple-language capability
 - j. Community alert system(s)
 - k. Provide easy to understand directions that help the crowd disperse so that they clearly understand the desired response
 - l. Using video/audio recording equipment for documentation of the dispersal order, the crowd response and their ability to hear
 - m. Use of social media platforms to send out alerts to specific areas

NEW

9. Emergency Medical Services personnel should be staged before the use of crowd dispersal techniques defined below unless exigent circumstances exist. While SDPD does not have jurisdiction over San Diego Fire-Rescue personnel, officers may suggest EMS have proper materials on-site for the situation. For example, officers may suggest ample water be available for decontamination if the use of chemical agents is anticipated.
10. Unless exigent circumstances exist, crowd dispersal techniques shall not be initiated until the Incident Commander has ensured dispersal announcements have been made to the crowd.
11. These dispersal announcements must be made using adequate sound amplification equipment to ensure that they are audible over a sufficient area. The dispersal orders should be repeated after the commencement of the dispersal operation so that persons not present at the original broadcast will understand that they must leave the area. Consider using a bullhorn, vehicle Public Address (PA) system, Long-Range Acoustical Device (LRAD), or ABLE.
12. The Incident Commander should ensure that the name of the individual making the dispersal order and the date, time(s), and location(s) each order was given is recorded.
13. Officers shall document the details of the dispersal order in their probable cause declarations and arrest reports when charging 407/408 PC - Unlawful Assembly or 409 PC - Failure to Disperse.
14. Unless an immediate risk to public safety exists or significant property damage occurs, a reasonable time will be allowed for a crowd to comply with police commands before taking action.
15. The Incident Commander should note if all or part of the crowd responds to the dispersal order and attempts to leave, or whether there is an unwillingness to comply or willful defiance of the dispersal order.
16. If orders to disperse do not result in voluntary movement/compliance by the crowd, the Incident Commander may elect to use crowd dispersal techniques described in section IX of this procedure.
17. When a command decision is made to employ crowd dispersal techniques, continue attempts to obtain voluntary compliance and cooperation through announcements and negotiation. The Incident Commander shall suspend crowd dispersal techniques when a crowd reasonably appears to be dispersing. Crowd dispersal techniques may be re-employed if compliance ceases.
18. When a crowd disperses pursuant to a declaration of unlawful assembly, and the participants subsequently assemble at a different geographic location outside the dispersal area, and are engaged in non-violent and

lawful First Amendment Activity, the new assembly cannot be dispersed until the Incident Commander has determined that a new unlawful assembly is occurring. At such time, the Incident Commander will follow the steps outlined above for declaring an unlawful assembly.

19. If unlawful or violent activity continues as the crowd moves, the event should be treated as a continuous unlawful assembly.

VIII. RIOT

- A. California Penal Code section 404(a) states, "Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by the immediate power of execution, by two or more persons acting together, and without the authority of law, is a riot."
- B. California Penal Code section 404.6(a) states, "Every person who with the intent to cause a riot does an act or engages in conduct that urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances that produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of incitement to riot."
- C. California Penal Code section 410 states, "If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this Chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor."
- D. In order to reasonably comply with P.C. 410, it is imperative that the Incident Commander assesses the situation on an ongoing basis to determine if the level of behavior of the crowd rises to the level of a riot. If the Incident Commander determines the elements of a riot have been met, the Incident Commander shall, as reasonable circumstances permit, implement strategies as described in Section VII- Unlawful Assembly, as well as Section IX- Crowd Dispersal Strategies, Objectives and Techniques.

Some factors to consider when responding to a riot include, but are not limited to: the size of the riotous crowd versus available officers, weapons being used by those involved in the riot as compared to those possessed by officers, and capable defensive measures officers may be able to use while interacting with the riotous crowd.

IX. CROWD DISPERSAL STRATEGIES, OBJECTIVES AND TECHNIQUES

- A. Crowd dispersal strategies and techniques shall be consistent with the Department's objectives to minimize harm, honor constitutional rights,

communicate with the event participants, and facilitate peaceful First Amendment Activity.

- B. Should negotiation and verbal announcements to disperse not result in the crowd's voluntary movement, officers may employ additional crowd dispersal techniques, but only after orders from the Incident Commander or their designees.
- C. Reasonable force under the totality of the circumstances will be used consistent with DP 1.04.
- D. Some of the permissible techniques to disperse or control a non-compliant crowd includes the following (not in any specific order of use):
 - 1. Display of police officers
 - a. A police formation may be moved as a unit to an area within the crowd's view to assist with crowd management. If a display of police officers, motorcycles, police vehicles, and mobile field forces, combined with a dispersal order, is ineffective, other techniques may be employed.
 - b. Generally, officers should be assigned to teams of sufficient size to be effective.
 - 2. Containment and Arrest for Violent Criminal Activity
 - a. If violent criminal activity is occurring, and the crowd has failed to disperse after the required announcements, officers may contain the crowd or a portion of the crowd for purposes of making multiple, simultaneous arrests.
 - (1) As described below, this technique shall not be used in response to non-violent civil disobedience.
 - (2) This technique shall not be used simply to disperse a crowd after an unlawful assembly declaration.
 - b. Officers should not be sent into a hostile crowd solely to communicate with them. Officers should not penetrate a crowd for an individual arrest unless the targeted individual is involved in criminal conduct which endangers persons or property. The decision to move into the crowd should generally be under the direction of the Incident Commander or designee.
 - c. Persons who make it clear that they seek to be arrested (e.g., sitting down, locking arms) shall be arrested and not subjected to other dispersal techniques.

- d. Arrests of non-violent persons shall be accomplished by verbal commands and persuasion, handcuffing, lifting, carrying, or the use of lesser controlling force, such as control holds, pressure point techniques, and the bent-wrist control hold or the use of OPNs, consistent with Department Procedure 1.04 - Use of Force.
 - e. Where remaining demonstrators have been advised that they will be subject to arrest if they choose to remain and still refuse to disperse, a member of the arrest team shall individually advise each demonstrator that he or she is under arrest before the application of any force to remove locking devices or to move the demonstrators.
 - f. In the event control holds are necessary, precautions should be taken to assure that arrestees are not injured or subjected to unnecessary or excessive pain, consistent with Department Procedure 1.04.
 - g. The decision to use control holds, and the reasons for applying force shall be documented on all appropriate forms and in Blue Team, consistent with Department Procedure 1.04.
 - h. On occasion, persons involved in a riot or unlawful assembly go mobile and commit criminal acts such as assault, vandalism, theft, etc., while actively fleeing or avoiding law enforcement. In these dynamic situations, officers may use techniques that are reasonable and compliant with existing policy, procedure, and law to encircle/contain such groups and affect the appropriate arrests.
3. Police Formations and Use of Batons
- a. If a crowd refuses to disperse after the required announcements, mobile field force formations may be used to move or disperse the crowd.
 - b. Batons may be visibly displayed and held in a ready position during formations.
 - c. Batons shall only be used as specified in DP 1.04 – Use of Force.
4. Use of Munitions
- a. **See Section X of this Procedure for limitations on the use of munitions.**
 - b. Unlawful assemblies are created when some or all involved in the assembly begin to violate local, state, or federal laws. It poses a unique situation for law enforcement to potentially control or arrest a large group of people, acting in concert.

NEW

- c. In these situations, less lethal tools may be a force multiplier, making it safer for all involved following the declaration of an unlawful assembly in moving/dispersing the riotous crowd and/or making arrests.
- d. Use of Specialty Munitions (DP 1.36) – Use of specialty munitions shall comply with Department Procedure 1.36. Generally, munitions 1-4, listed below, may be used while on the line and should be a coordinated effort directed by an Incident Commander. Munitions 1-4 may generally be used in coordination with the SWAT Munitions Team.

Authorization for munitions 5 and 6, listed below, shall be obtained by an Assistant Chief level officer and carried out by the SWAT munitions Team Leader

- (1) OC spray (Oleoresin Capsicum)
- (2) 40 mm foam baton rounds
- (3) Pepperballs (OC)
- (4) Flashbangs
- (5) CS gas grenades
- (6) Rubber Sting Balls- defensive maneuver for law enforcement personnel when faced with overwhelming aggression placing officers in immediate physical risk of serious bodily injury or death.

5. Arrests

- a. The Prisoner Processing Unit should be consulted before the event should mass arrests be anticipated.
- b. All arrests shall be based upon probable cause and conducted in compliance with existing Department Procedure 6.02 – Booking Procedures.
- c. All persons subject to arrest during a demonstration or crowd event shall be handcuffed per Department Procedure 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures.
- d. Officers should be cognizant that flex-cuffs may tighten when arrestees' hands swell or move, sometimes merely in response to pain from the cuffs themselves.

- e. Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.
6. Video Recording by Department Members
- a. The goal of police involvement at peaceful First Amendment activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.
 - b. Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.
 - c. When there is a reason to believe that a planned event has the potential for unlawful activity, the Incident Commander should contact the Media Services Unit to coordinate with the Supplemental Video Team (SVT), consistent with Department Procedure 3.26
 - d. Refer to the Media Services Unit Operations Manual for further details regarding the use of the Supplemental Video Team.
 - e. If the Incident Commander or designee determines that a lawful assembly has turned into an unlawful assembly, officers should be directed to place BWCs in Event mode to begin recording the unlawful activity. Additionally, the Incident Commander or designee should coordinate with the Supplemental Video Team (SVT) to provide supplemental video documentation of the event.
 - f. Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

NEW X. **USE OF ENERGY PROJECTILES AND CHEMICAL AGENTS TO DISPERSE A CROWD (ASSEMBLY BILL 48)**

- A. Use of kinetic energy projectiles and chemical agents shall not be used to disperse an assembly, protest, or demonstration, except as authorized by AB 48, which added Section 13652 to the Penal Code. **All sworn members of the Department**

shall comply with the requirements and standards set forth in Penal Code section 13652.

B. Penal Code section 13652 reads as follows:

- (a) Except as otherwise provided in subdivision (b), kinetic energy projectiles and chemical agents shall not be used by any law enforcement agency to **disperse** any assembly, protest, or demonstration.
- (b) Kinetic energy projectiles and chemical agents shall only be deployed by a peace officer that has received training on their proper use by the Commission on Peace Officer Standards and Training for crowd control if the use is objectively reasonable to defend against a threat to life or serious bodily injury to any individual, including any peace officer, or to bring an objectively dangerous and unlawful situation safely and effectively under control, and only in accordance with all of the following requirements:
 - (1) De-escalation techniques or other alternatives to force have been attempted, when objectively reasonable, and have failed.
 - (2) Repeated, audible announcements are made announcing the intent to use kinetic energy projectiles and chemical agents and the type to be used, when objectively reasonable to do so. The announcements shall be made from various locations, if necessary, and delivered in multiple languages, if appropriate.
 - (3) Persons are given an objectively reasonable opportunity to disperse and leave the scene.
 - (4) An objectively reasonable effort has been made to identify persons engaged in violent acts and those who are not, and kinetic energy projectiles or chemical agents are targeted toward those individuals engaged in violent acts. Projectiles shall not be aimed indiscriminately into a crowd or group of persons.
 - (5) Kinetic energy projectiles and chemical agents are used only with the frequency, intensity, and in a manner that is proportional to the threat and objectively reasonable.
 - (6) Officers shall minimize the possible incidental impact of their use of kinetic energy projectiles and chemical agents on bystanders, medical personnel, journalists, or other unintended targets.
 - (7) An objectively reasonable effort has been made to extract individuals in distress.
 - (8) Medical assistance is promptly provided, if properly trained personnel are present, or procured, for injured persons, when it is reasonable and safe to do so.

- (9) **Kinetic energy projectiles shall not be aimed at the head, neck, or any other vital organs.**
- (10) **Kinetic energy projectiles or chemical agents shall not be used by any law enforcement agency solely due to any of the following:**
 - (A) **A violation of an imposed curfew.**
 - (B) **A verbal threat.**
 - (C) **Noncompliance with a law enforcement directive.**
- (11) If the chemical agent to be deployed is tear gas, only a commanding officer at the scene of the assembly, protest, or demonstration may authorize the use of tear gas.
- (c) This section does not prevent a law enforcement agency from adopting more stringent policies.
- (d) For the purposes of this section, the following terms have the following meanings:
 - (1) “Kinetic energy projectiles” means any type of device designed as less lethal, to be launched from any device as a projectile that may cause bodily injury through the transfer of kinetic energy and blunt force trauma. For purposes of this section, the term includes, but is not limited to, items commonly referred to as rubber bullets, plastic bullets, beanbag rounds, and foam tipped plastic rounds.
 - (2) “Chemical agents” means any chemical that can rapidly produce sensory irritation or disabling physical effects in humans, which disappear within a short time following termination of exposure. For purposes of this section, the term includes, but is not limited to, chloroacetophenone tear gas, commonly known as CN tear gas; 2-chlorobenzalmalononitrile gas, commonly known as CS gas; and items commonly referred to as pepper balls, pepper spray, or oleoresin capsicum.
- (e) This section does not apply within any county detention facility or any correctional facility of the Department of Corrections and Rehabilitation.

NOTE: This directive does not prohibit officers’ abilities to use appropriate force options to defend themselves or others as defined in Department Procedure 1.04.

XI. RESOURCES

- A. Appropriately managing First Amendment Activity can be resource intensive. Several units within the San Diego Police Department can lend special skills and equipment to facilitate safe First Amendment Activities and a safe resolution to unlawful assemblies and riot scenarios. Each unit abides by Department Directives and the Unit's Operations Manual. Some of these resources include:
1. Air Support Unit
 2. Bicycle Teams
 3. Criminal Intelligence Unit
 4. Emergency Medical Services (Fire-Rescue)
 5. Homeland Security / Critical Incident Management Unit
 6. Information Services and Data Systems
 7. In-Service Training Unit
 8. Legal Advisors
 9. Media Services Unit
 10. Mobile Field Force-Bravo and Delta Platoons
 11. Mobile Field Force "Alpha" deployments
 12. Mobile Field Force Wave deployments
 13. Motors Unit
 14. Operational Support Administration
 15. Prisoner Processing Unit
 16. Special Event Traffic Controllers (SETCs)
 17. SWAT
 18. SWAT Munitions
 19. Traffic Division
 20. Unmanned Aerial Systems (UAS) Unit
 21. Volunteer Services

XII. PUBLIC INFORMATION AND THE MEDIA (DPs 1.30, 1.31 and 8.09)

- A. The media have a right to cover First Amendment Activity, including the right to record the event on video, film, photographs, and other mediums.
- NEW** B. The media shall never be targeted for dispersal or enforcement action because of their media status. Officers shall not request nor require media or other members of the public to stop, pause, or discontinue audio or video recording.
- NEW** C. Police Department members shall accommodate the media, to the extent possible and reasonable. When the immediate area surrounding a command post, police line, or rolling closure at the site of First Amendment Activity has been closed, California Penal Code section 409.7 allows duly authorized members of the media access to the closed area. This access applies to a “duly authorized representative” of any news service, online news service, newspaper, or radio or television station, or network.
1. If access is granted to closed areas, members of the media are still not permitted entry into a command post or allowed to move through police lines and interfere with police actions. These violations may be cause for removing a journalist from a closed area or charging an offense not precluded by 409.7 PC. **Refer to DP 1.30 for further details regarding classification as a duly authorized media representative and PC 409.7.**
 - a. Even after a dispersal order has been given, clearly identified members of the media shall be permitted to carry out their professional duties unless their presence would unduly interfere with enforcement action. A member of the media shall not be cited for the failure to disperse, a violation of a curfew, or a violation of Penal Code section 148(a)(1) for gathering, receiving, or processing information.
 - b. Persons with a known history of participating and coordinating activities at events, interfering with police operations, or engaging in criminal conduct should be referred to a supervisor if they identify themselves as a journalist or member of the media and request access to closed areas.
- NEW** D. Members of the media may not interfere with arrests, assault officers, or commit criminal acts under local, state, or federal law. Any criminal offenses by a media member shall be thoroughly documented, detailing specific facts, witnesses, and evidence.

XIII. MUTUAL AID REQUESTS

Refer to Department Procedure 8.10, Critical Incidents - Mutual Aid.

XIV. AFTER ACTION REPORTS

Refer to Department Procedure 8.11, Incident Report Procedures.



THE CITY OF SAN DIEGO
M E M O R A N D U M

Date: March 30, 2021
To: David Nisleit, Chief, San Diego Police Department
From: Brandon Hilpert, Chair, Commission on Police Practices *BH*
via Sharmaine Moseley, Interim Executive Director *SM*
Subject: Recommendations to the San Diego Police Department

The Commission on Police Practices (“CPP” or “Commission”) appreciates that the San Diego Police Department (SDPD) accepted the former CRB’s recommendation to create a stand-alone policy which would provide a clear structure on how SDPD responds to First Amendment protected protest activities.

The Commission reviewed SDPD’s new procedure (4.17) and held public meetings to discuss its proposed clarifications and revisions. The Commission’s Policy Committee held a public meeting on February 25, 2021 as well as a community roundtable on March 18, 2021. At its Open Meeting on March 23, 2021, the Commission voted unanimously to make the following policy recommendations to the SDPD for its consideration:

1. Include in the policy, SDPD’s existing guidelines regarding pre-protest planning with event organizers. As it currently stands, the new policy reads more strictly as crowd control, rather than facilitation of First Amendment protected activities. We would also like to see a section that discusses protecting the safety of peaceful protesters.
2. Clearly restate that existing policies and procedures remain in full force and effect during protest activities. Specifically, body worn camera (1.49), de-escalation (1.55), duty to intervene (1.56), identification of officers (5.10 and 9.19).
3. Address how juveniles are treated during protest activities in line with existing procedures, for example, handcuffing or detention of minors.
4. The procedure references the verbiage of California Penal Code 407 in the definition of an unlawful assembly. However, we would like assurances that a protest will not be declared unlawful simply because it is

- “boisterous.” The policy should be clear that per case law, there must be a clear and present danger to persons or property before an unlawful assembly can be declared.
5. Include in the policy, a statement that preservation of life shall take precedence over protecting property.
 6. Specifically related to the issuance of dispersal orders once an unlawful assembly has been declared:
 - a. Require officers to have their body worn cameras activated in Event Mode to record the circumstances in which created an unlawful assembly order.
 - b. Require that the Officer making the dispersal order shall have their BWC activated to record the dispersal order as well as an Officer stationed behind the protest participants to ensure audible commands were able to be heard.
 - c. Section VII. C. 2. states “the officer is not required to use any particular words”, however, this conflicts with 7 which provides a detailed script to be used. We recommend the specific script be used.
 - d. State that the dispersal order must be given at least three times, with one minute between each order and the script must include a clear time requirement for participants to depart the scene (for example, participants have five minutes to depart, but not less than three minutes).
 - e. Clarify “amble means of egress”, factoring in considerations like participants which may have mobility issues.
 - f. For pre-planned protest activities, add communication options to include languages other than English and Spanish. For example, traffic signage to assist those that may be hearing impaired.
 7. When staging for EMS, require that EMS providers have proper materials on-hand for the situation. For example, ample water shall be available to decontaminate participants that have had OC utilized on them per existing policy 1.06.
 8. Define “a reasonable time.” The procedure needs to be clear as to what a reasonable time is for a crowd to disperse. We propose this time be not less than three minutes.
 9. Reiterate that use of OC spray is prohibited at this stage of resistance. We do not believe those individuals exhibiting “passive resistance” should be subject to the use of “impact weapons, impact weapon control holds, pain compliance or pressure points” which would technically be permitted under the existing Use of Force Matrix per 1.04.
 10. In the section regarding the use of specialty munitions, list options to be utilized in order of escalation by munition type as well as have clear and

- significant descriptions as to when and how they are utilized, handled and removed.
- a. 40 mm foam baton rounds should be utilized only as a last resort
 - b. CS gas grenades and rubber sting balls need to have clear and explicit references as to when use is permissible
11. In the utilization of flexcuffs procedure specify that Officers shall replace flexcuffs should they tighten by using the existing 6.01 procedures. Officers shall write their ID number on the flexcuffs of each individual they take into custody and officers shall mark the flexcuffs indicating initial placement to assist in visually observing if flexcuffs unexpectedly tighten.
 12. Body Worn Camera Usage
 - a. Add a new section for BWC retention periods for peaceful protest activities (no arrests, no complaints).
 - b. Add a clear statement that any BWC of protest activities shall or must not be used, stored, logged or cataloged to document or create a database of individuals participating in legal protest activities.
 13. Officers shall not request nor require media or other members of the public to stop, pause or discontinue audio or video recording.
 14. Add a new section that addresses the status and rights of legal observers and/or non-participants. Legal observers should be clearly identified and shall not be specifically targeted by officers.
 15. Require officers to provide the name and ID number of the commanding officer/incident commander at the scene.
 16. Include an unambiguous prohibition of officers obstructing their badge, name and/or ID numbers as well as a clear prohibition of providing false identification details
 17. Reconsider the policy of allowing only ID numbers to be given during protest activities.
 18. Consider addressing how officers deal with individuals participating in peaceful civil disobedience such as officers using bicycles as weapons or shields and using “follow cars” during protest activities.
 19. Require that if outside law enforcement agencies participate in City of San Diego protests under mutual aid agreements, such outside agencies should be subject to SDPD policies and procedures.

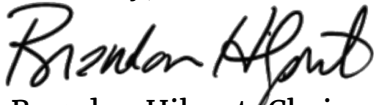
Additionally, the Commission recommends changes to the following procedures:

1. Body Worn Camera (1.49)- Remove the exclusion for mandated body worn camera recordings in secure facilities (Sally Port, detention rooms etc.). Although many secure areas have security footage, this footage does not contain audio and frequently is too far away to properly determine what may have occurred. Any interaction with a detainee should be recorded.

2. Chemical Agent Usage (1.06)- Require officers to provide a verbal warning prior to using chemical OC spray where possible. This would bring it in line with the Use of Force procedural (1.04) requirement for officers to provide a verbal warning prior to firing their firearm.
3. Maximum Restraint Time Limit (6.01)- Update this procedure to include a maximum time that an individual would be placed in the WRAP device to no more than 2 hours. (Currently there is no time limit stated.)
4. Utilization of Seatbelts on Prisoners (6.01)- Modify this policy to increase the requirements necessary prior to seatbelts not being utilized under the officer safety exemption. As this procedure stands today, we do not believe this procedure is enforceable.
5. Observation of Detainees in Sally Port- Require officers to check in on the status/welfare of detainees under their custody at least every 15 minutes.

Thank you for your consideration on the Commission's policy recommendations. If you have any questions, please do not hesitate to contact me at [REDACTED].

Sincerely,



Brandon Hilpert, Chair
Commission on Police Practices

cc: Honorable Mayor Todd Gloria
Jay Goldstone, Chief Operating Officer
Paola Avila, Chief of Staff
Al Guaderrama, Executive Assistant Chief
Mike Holden, Captain, Internal Affairs
Matt Yagyagan, Deputy Director of Policy, Office of the Mayor
Mathew Gordon, Director, Office of Boards and Commissions
Christina Cameron, Outside Counsel, Commission on Police Practices
Members of the Commission on Police Practices



THE CITY OF SAN DIEGO

M E M O R A N D U M

DATE: May 25, 2021

TO: David Nisleit, Chief of Police
via Chris McGrath, Executive Assistant Chief

FROM: Jeffrey Jordon, Captain, Chief's Office/Special Projects

SUBJECT: Responses to Commission on Police Practices – Department Procedure 4.17

Introduction:

The San Diego Police Department (SDPD or Department) implemented Department Procedure (DP) 4.17, First Amendment Activity Facilitation and Management, and the intent was to give officers a roadmap to protect and facilitate the safe expression of First Amendment rights in cooperation with all community members.

This procedure was also intended to be completely transparent, so the public has a clear understanding of how and why SDPD makes public safety decisions relating to First Amendment activities.

In drafting DP 4.17, the San Diego Police Department researched case law, solicited subject matter expert input, reviewed after-action reports from around the country, and examined existing policies from other law enforcement agencies.

The California Commission on Peace Officer Standards and Training (POST) released a document in April of 2021 titled, "POST Guidelines Crowd Management, Intervention, and Control." While the document does not list "best practices," it provides a number of examples, discussions, and considerations. Many of the considerations in the POST document were already present in DP 4.17.

As with previous collaborations, SDPD believes the Commission on Police Practices' (CPP) recommendations are an opportunity to assess its current procedure, participate in an open dialogue, and provide clarity to its decisions and ongoing efforts to meet community expectations.

This memorandum addresses CPP’s recommendation in three parts. In Part I, SDPD outlines the recommendations where there is immediate agreement to modify DP 4.17 to address expressed concerns.

In Part II, SDPD reviews the recommendations from CPP which DP 4.17 appears to either largely incorporate or are addressed through pre-existing Department Procedures. SDPD highlights these procedures within this memorandum. Additionally, SDPD welcomes discussion with CPP to fully explore remaining concerns and determine how they should be addressed.

In Part III, SDPD identifies CPP recommendations which are operationally or legally problematic for SDPD to include within DP 4.17. Part III also offers a detailed explanation examining the potential impact of these recommendations more thoroughly.

The Department anticipates its responses will generate further discussion and looks forward to participating in this process with CPP to answer additional questions, enhance understanding, and determine where additional solutions might be found.

Part I: Accepted Recommendations

CPP Recommendation – Penal Code 407:

“The procedure references the verbiage of California Penal Code 407 in the definition of an unlawful assembly. However, we would like assurances that a protest will not be declared unlawful simply because it is “boisterous.” The policy should be clear that per case law, there must be a clear and present danger to persons or property before an unlawful assembly can be declared.”

SDPD Response:

This is correct and the procedure will be amended accordingly.

CalCrim 2685 Participating in an Unlawful Assembly (Pen. Code, §§ 407, 408) states in the Bench Notes:

Penal Code section 407 defines an ‘unlawful assembly’ as two or more people assembled together ‘to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner.’ The Supreme Court has held that “the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence.’ (*In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (9th Cir. 1996) 110 F.3d 1363, 1371.)

Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is ‘boisterous or tumultuous’ does not establish a violation of the statute.

CPP Recommendation – Mobility Issues:

“Clarify “ample means of egress,” factoring in considerations like participants which may have mobility issues.”

SDPD Response:

SDPD will add inclusive language regarding this consideration.

CPP recommendation – Enhanced Communication:

“For pre-planned protest activities, add communication options to include languages other than English and Spanish. For example, traffic signage to assist those that may be hearing impaired.”

SDPD Response:

SDPD will amend DP 4.17 to include the POST recommended considerations. Per POST, methods that may be used to deliver and document dispersal orders include (not in priority order):

- Loud speech
- Amplified sound
- Ensuring that the order is heard in remote areas
- Using unmanned aircraft equipped with amplified sound flown to inaccessible areas
- Pre-recorded unlawful assembly messages in multiple languages as appropriate
- **Display of signage, including electronic signage and billboards, indicating unlawful assembly, dispersal and clearly identified routes of egress**
- Gaining the attention of the crowd and documenting affirmative responses of crowd members prior to the declaration of unlawful
- Positioning law enforcement personnel to the rear of a crowd to confirm and document hearing the transmission of the dispersal order
- Acquiring multiple-language capability
- Community alert system(s)
- Provide easy to understand directions that help the crowd disperse so that they clearly understand the desired response
- Using video/audio recording equipment for documentation of the dispersal order, the crowd response and their ability to hear
- Use of social media platforms to send out alerts to specific areas

CPP Recommendation - EMS:

“When staging for EMS, require that EMS providers have proper materials on-hand for the situation. For example, ample water shall be available to decontaminate participants that have had OC utilized on them per existing policy 1.06.”

SDPD Response:

While SDPD does not exercise authority over Fire/EMS service, SDPD will add appropriate language that cooperative pre-planning with SDFD is recommended to ensure adequate resources are available to address potential situations involving decontamination.

Part II: Recommendations Currently Addressed in Existing Department Procedures

SDPD strives to publish clear and concise procedures. Care is taken not to duplicate pre-existing procedures. All officers are responsible for abiding by all SDPD policies and procedures.

Department Policy 1.01 – Department Policies, Procedures, Orders, Communications, and Correspondence, states:

Department directives (e.g., Legal Updates, Orders, Policies, Procedures and Training Bulletins) are written directives that convey the same authority. All members of the Department will be held responsible for abiding by the information contained in Legal Updates, Orders, Policies, Procedures and Training Bulletins.

Department Policy 9.03 – Obedience to Rules Policy, states:

Members shall not commit any acts nor fail to perform any acts that constitute a violation of the policies, procedures, directives or orders of the Department, the City of San Diego Administrative Regulations, the Personnel Regulations Manual, the Civil Service Rules, or the City Charter.

The CPP provided a number of additional recommendations which DP 4.17 appears to already incorporate. In some cases, the CPP recommendations are covered by other, pre-existing Department Procedures.

SDPD will present additional details, beyond this memorandum, at a mutually acceptable time with CPP to explore whether the current DP 4.17 and related procedures adequately address the recommendations in this section and seek guidance on where further modifications are warranted.

CPP Recommendation – Pre-Protest Planning:

“Include in the policy, SDPD’s existing guidelines regarding pre-protest planning with event organizers. As it currently stands, the new policy reads more strictly as crowd control, rather than facilitation of First Amendment protected activities.”

SDPD Response:

DP 4.17 includes extensive sections on facilitation and cooperation, specifically:

Section V.A.1: When appropriate, and consistent with Department Procedure, 8.04, the Incident Commander shall be responsible for developing a written contingency or incident action plan, consistent with the Department’s goals and objectives to minimize harm, honor constitutional rights, communicate with the event participants, and facilitate First Amendment Activity. This plan may be in a Department Memorandum format or the ICS 201 format. All or parts of the contingency or incident action plan may be exempt from public disclosure pursuant to the California Public Records Act. Each plan shall be marked accordingly.

Section V.A.5: Stakeholder involvement is essential to the overall success of managing First Amendment Activities. When knowledge exists that a First Amendment Activity may occur, the Incident Commander or designee shall proactively make reasonable attempts to establish and maintain communication and cooperation with representatives or the First Amendment Activity leaders.

Section V.A.6: If communication is established, the Incident Commander or designee shall make reasonable efforts to identify the event's representatives or leaders and identify a primary police liaison. The primary police liaison should be requested to be in continuous contact with an assigned police representative designated by the Incident Commander.

Section V.A.7: In planning for First Amendment Activity, Incident Commanders, or their designees, should consider the following factors in determining the appropriate resources and level of preparation necessary:

What type of First Amendment Activity is expected to occur? (Press conference, demonstration, protests, static event, labor strike, picket line, march, caravan, sit-in/dine-in, etc.)

What is the goal of the First Amendment Activity? (Raise awareness, disrupt a target location, counter another demonstration, engage in criminal activity, etc.)

When will the First Amendment Activity occur? (Day of the week, holiday, time of day/traffic patterns, daytime/nighttime, conflict with other events at the same time.)

Will there be an organizing individual/group, or will this be a crowd without identified leadership?

Has the Department previously worked with the organizers? Have prior First Amendment Activities been lawful?

Where will the First Amendment Activity likely occur? Will the event affect critical infrastructure like police stations, jails, courthouses, freeways, government buildings, etc.? Will the effect be deliberate or collateral?

If the group intends to be mobile, what will the predicted or planned route(s) be? (First Amendment Activity participants may not provide their own traffic control.)

What will be the projected size of the First Amendment Activity event?

What will the composition of the group be? (Juveniles, students, labor unions, known local groups, known groups from outside the area, unified as to a single cause, or diverse causes and points of view within the group, etc.)

Will the hosting group provide its own marshals or monitors?

Will an opposing group attend the First Amendment Activity event?

Is there a likelihood of improvised or conventional weapons?

Are arrests likely? Will prisoner processing be necessary?

Is civil disobedience planned or likely?

Is unlawful assembly planned or likely?

Is riot planned or likely?

CPP Recommendation – Protest Safety:

“We would also like to see a section that discusses protecting the safety of peaceful protesters.”

SDPD Response:

SDPD is committed to the safety of all persons present, even those who are criminal suspects.

SDPD uses de-escalation techniques (DP 1.55), requires officers to report misconduct (DP 9.33) and requires officers to intervene in unreasonable force (DP 1.56). SDPD also uses appropriate escalation measures to maintain order and tactics intended to isolate and address individual offenders based on their level of criminal conduct and resistance:

DP 4.17, Section III: Background states:

Article 1, sections 1 through 3, of the California Constitution also guarantees the rights to life, liberty, acquiring and possessing property, pursuing safety, happiness, and privacy, as well as the rights to speak freely, to freedom of the press, to petition the government for redress of grievances, and to assemble freely to consult for the common good.

The San Diego Police Department supports all people's fundamental right to peaceably assemble and their right to freedom of speech and expression.

The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.

In furtherance of these rights, and to facilitate the safe and peaceful exercise of an individual or group's First Amendment rights, the Department will act swiftly and with resolve to protect human life, property, and maintain peace when confronted with violence, threats of violence, assaults, or other criminal acts.

CPP Recommendation – Restatement of Policies and Procedures:

“Clearly restate that existing policies and procedures remain in full force and effect during protest activities. Specifically, body worn camera (1.49), de-escalation (1.55), duty to intervene (1.56), and identification of officers (5.10 and 9.19).”

SDPD response:

All SDPD officers are responsible for abiding by all SDPD rules and regulations at all times (DP 1.01, DP 9.03).

CPP mentions several specific sections, which are referenced in DP 4.17 as listed below:
Body Worn Camera (BWC) Policy is referenced in section IV.J:

Supplemental Video Team (SVT) – The Supplemental Video Team is a resource available to the Incident Commander during First Amendment Activity covered under this procedure. The SVT will consist of personnel from the Media Services Unit. The objective will be to use video cameras to capture images, video and audio recordings to supplement information captured from officers' Body Worn

Cameras (BWCs). The SVT will adhere to Department Procedure 3.26- Media Evidence Recovery and Impounding/Preserving Procedures.

BWC Policy is referenced in section VII.C.6:

Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.

BWC Policy is referenced in section IX.6.B:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

BWC Policy is referenced in section IX.6.B:

Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

BWC Policy is referenced in section IX.6.F:

Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

De-Escalation Policy is referenced in section V.A.8:

The operations plan created to address a First Amendment Activity event should anticipate various scenarios and devise a police contingency plan. All plans shall include de-escalation considerations in compliance with Department Procedure 1.55.

The Identification Policy, 5.10, is referenced in section V.A.10:

ID only name tags may only be worn during a Mobile Field Force (MFF) event with Incident Commander approval, consistent with Department Procedure 5.10.

CPP Recommendation - Juveniles:

“Address how juveniles are treated during protest activities in line with existing procedures, for example, handcuffing or detention of minors.”

SDPD Response:

Officers are responsible for abiding by all existing SDPD rules and regulations, including the following, which apply to both juveniles and adults: DP 1.04 – Use of Force, DP 1.06 – Use of Liquid Chemical Agents, DP 1.07 – Use of Tasers, 1.36 – Use of Specialty Munitions, DP 3.06 – Juvenile Procedures, DP 4.01 – Stop, Detention, and Pat-Down Procedures, DP 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures, etc.

CPP Recommendation – Preservation of Life:

“Include in the policy, a statement that preservation of life shall take precedence over protecting property.”

SDPD Response:

This is interwoven into SDPD’s Vision Values and Mission Statement, as well as multiple Department Procedures. The very first value is Human Life:

Human Life: Our efforts will be oriented toward the goal of protecting human life and ensuring everyone has the opportunity to thrive.

This is followed by:

Integrity: Our actions will be guided by the highest level of virtue and ethical practice through open communication and transparency.

Partnerships: We will work collaboratively with our community to resolve challenges, protect individual rights, and promote prosperity.

Diversity: We embrace and appreciate the unique experiences and backgrounds that provide strength and unity to our organization.

Compassion: We will strive to show genuine concern for one another in both our interactions with the community and within our organization. We recognize that the complexities of life compel us to do nothing less.

Innovation: We are committed to leading the law enforcement community through innovative practices in order to maintain our position at the forefront of policing.

Courageous Justice: We will be undeterred in our pursuit of fairness, peace, and a genuine well-being for all people.

Department Policy 1.04 – Use of Force states:

Members shall only use force in accordance with law and established Department procedures. Members shall not use more force than is reasonably necessary under the circumstances. Department policy places a greater value on the preservation of life than on the apprehension of criminal offenders. Deadly force shall be used only when all reasonable alternatives have been exhausted or appear impractical. Members shall not mistreat persons who are in custody. Members shall handle such persons in accordance with all laws and established Department Procedures.

Department Policy 9.01 – General Duties Policy states:

Officers on duty shall at all times, lawfully protect life and property, detect and arrest violators of the law, prevent crime, preserve the public peace and enforce the laws of the state of California and the ordinances of the City of San Diego...

... When within the State of California, officers shall assist any law enforcement officer who appears to be in need of immediate assistance and shall assist in the prevention of the commission of any felony or in the apprehension of any felon. Officers shall also take appropriate action where a serious threat to life or property exists...

CPP Recommendation – BWC Activation:

“Specifically related to the issuance of dispersal orders once an unlawful assembly has been declared: Require officers to have their body worn cameras activated in Event Mode to record the circumstances in which created an unlawful assembly order.”

SDPD Response:

This is covered in DP 4.17, IX.C.6.b:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

This is further covered in DP 4.17, IX.C.6.e:

If the Incident Commander or designee determines that a lawful assembly has turned into an unlawful assembly, officers should be directed to place BWCs in Event mode to begin recording the unlawful activity. Additionally, the Incident Commander or designee should coordinate with the Supplemental Video Team (SVT) to provide supplemental video documentation of the event.

SDPD has to balance recording unlawful acts or lawful acts done in a violent manner or in a manner where violence is imminent against unnecessarily recording lawful First Amendment activity.

CPP Recommendation – Dispersal Orders:

“Require that the Officer making the dispersal order shall have their BWC activated to record the dispersal order as well as an Officer stationed behind the protest participants to ensure audible commands were able to be heard.”

SDPD Response:

This is covered in DP 4.17, VII.C.3.5 and 6:

Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The dispersal order shall be given at least three (3) times, and when safe, with audible confirmation from officers behind the crowd.

The Incident Commander should ensure video recording occurs during unlawful assemblies, consistent with Department Procedures 1.49 and 3.26.

Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.

CPP Recommendation - Scripts:

“Section VII. C. 2. states “the officer is not required to use any particular words,” however, this conflicts with 7 which provides a detailed script to be used. We recommend the specific script be used.”

SDPD Response:

DP 4.17, VII.C.2 references the legal standard under California law.

DP 4.17, VII.C.7 refers to Department Policy, which is far more restrictive.

If an Incident Commander does not have a printed version of the SDPD language, they may still give the order and be within legal guidelines, even if they are out of compliance with Department Procedures.

CPP Recommendation – Timing of Dispersal Orders:

“State that the dispersal order must be given at least three times, with one minute between each order and the script must include a clear time requirement for participants to depart the scene (for example, participants have five minutes to depart, but not less than three minutes).”

SDPD Response:

SDPD is unable to find a resource suggesting this as a best practice. Additionally, DP 4.17 is more restrictive than both law and POST guidelines.

POST states, “Dispersal orders should be repeated.”

DP 4.17, VII.C.3 states:

Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The dispersal order **shall** be given at least **three (3)** times, and when safe, with audible confirmation from officers behind the crowd (emphasis added).

The CPP-proposed one-minute interval does not allow for officers to make rolling announcements or to play a recording on a loop. Rolling or looping announcements allows for multiple messages in multiple languages and gives a wider audience the chance of hearing the order.

POST says, “Provide sufficient time to disperse after the order,” and the intent of a dispersal order is to give people an opportunity to voluntarily leave. Voluntary compliance is always preferred to physical confrontation.

However, there might be a time when a crowd is especially violent, and a person needs to be rescued/extricated, or there is an exigent circumstance requiring swift action.

In re Wagner, 119 Cal. App. 3d 90, 103 (1981) states: “If a person is a participant in a lawful assembly which becomes unlawful, he has an immediate duty upon learning of the unlawful conduct to disassociate himself from the group.”

CalCrim 2686: Refusal to Disperse includes as a required element of failure to disperse: “The defendant willfully remained present at the location...after the order to disperse.”

A person must leave the unlawful assembly immediately after being ordered to disperse.

Explicitly giving people a time to linger gives criminal actors a window to prepare/brace for police action. It explicitly gives people permission to remain at the scene longer, even though they are required to leave the area immediately.

In an “example dispersal order” POST does include a timeframe. However, POST does not list providing a timeframe for people to leave as a “consideration” under “Dispersal Orders.”

CPP Recommendation OC Spray:

“Reiterate that use of OC spray is prohibited at this stage of resistance (passive).”

SDPD Response:

This is already covered in DPs relating to use of force and chemical agents.

DP 1.06 – Use of Liquid Chemical Agents States:

OC may only be used on a person who is engaged in active resistance, assaultive behavior, or life threatening behavior. Department Procedure 1.04, Use of Force, describes the various levels of resistance and assaultive behaviors.

Generally, OC should not be used to disperse a crowd without the approval of the on-scene field supervisor or the incident commander. In a crowd control situation, it is imperative that officers respond in a coordinated manner.

DP 1.04 – Use of Force mirrors DP 1.06 – Use of Liquid Chemical Agents by listing Chemical Agents under “Active Resistance.”

CPP Recommendation – Flex-Cuffs:

“In the utilization of flex-cuffs procedure, specify that officers shall replace flex-cuffs should they tighten, by using the existing DP 6.01 procedures.”

SDPD Response:

This is already written in 4.17:

IX.C.5.e: Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.

CPP Recommendation – BWC Retention Periods:

“Add a new section for BWC retention periods for peaceful protest activities (no arrests, no complaints).”

SDPD Response:

There is a demonstration/protest retention category for BWC. The retention period is designed to maintain footage in case of a complaint or city claim, which may be filed years after an event. It is not uncommon for a person to make a complaint when no force was used and no arrest was made. The BWC showing the absence of police intervention is valuable in these cases.

CPP Recommendation – BWC and Legal Protest Activities:

“Add a clear statement that any BWC of protest activities shall or must not be used, stored, logged or cataloged to document or create a database of individuals participating in legal protest activities.”

SDPD Response:

DP 4.17 section IX.C.6.b addresses this:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

CPP Recommendation – Audio/Video Recording:

“Officers shall not request nor require media or other members of the public to stop, pause or discontinue audio or video recording.”

SDPD Response:

This is already covered in DP 3.26 – Media Evidence Recovery and Impounding/Preserving Procedures in section IV.B.1. states:

- B. Video Recording, Audio Recording, and Photographing by Third Parties
 - 1. Recording and Photographing of Police Activity

- a. The general public has a First Amendment right to video record, and/or photograph Department members while they are conducting official business or while acting in an official capacity in any public space, unless such recordings interfere with police activity.
- b. A bystander has the same right to take photographs or make recordings as a member of the media as long as the bystander has a legal right to be present where he or she is located—public or private property; including an individual’s home or business, and common areas of public and private facilities and buildings.
- c. Members shall not threaten, intimidate, or otherwise discourage an individual from recording police enforcement activities or intentionally block or obstruct cameras or recording devices.
- d. The fact a bystander has a camera or other recording device does not, however, entitle the bystander to cross a police line, to enter an area that is closed to the public, or to enter any designated crime scene.
- e. A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, incite others to violate the law, or interfere with police activity. Interference consists of conduct, threats, actions or activities that prevent or hinder, or purport to prevent or hinder, members from doing their job.
- f. A person’s recording of members’ activity from a safe distance, and absent any action that obstructs the activity or threatens the safety of the member(s), does not constitute interference. Criticism of the police or the police activity being observed also does not amount to interference.
- g. Members are encouraged to provide ways in which individuals can continue to exercise their First Amendment rights, as officers perform their duties.

CPP Recommendation – Officer Identification:

“Include an unambiguous prohibition of officers obstructing their badge, name and/or ID numbers as well as a clear prohibition of providing false identification details.”

SDPD Response:

This is covered in DP 9.19:

Officers shall furnish their names and Department member identification numbers to any person requesting this information when they are on duty or while representing the Department in an official capacity, except when the withholding of such information is necessary for the performance of police duties or is authorized by the proper authority.

When a Mobile Field Force (MFF) activation takes place, the Incident Commander may authorize the use of ID only name tags. When this occurs, officers will only be required to furnish their Department identification number to any person requesting their name, ID number and/or badge number.

CPP Recommendation – ID Numbers:

“Reconsider the policy of allowing only ID numbers to be given during protest activities.”

SDPD Response:

Allowing ID numbers protects officers from the growing threats against them, which includes doxing. Doxing has been defined an act of publishing personal information of a person to harass, threaten, or incite violence against them, and doxing against law enforcement officers is well-documented. ID numbers, BWCs, and Vehicle Locators/GPS, not to mention citizen-provided-video, all provide ample ability to identify officers accused of misconduct.

CPP Recommendation – Officer Mobility and Monitoring:

“Consider addressing how officers deal with individuals participating in peaceful civil disobedience such as officers using bicycles as weapons or shields and using “follow cars” during protest activities.”

SDPD Response:

The use of police bicycles to form a fence is not a reportable use of force.

If a group aggresses/assaults a bicycle officers, officers may respond with an appropriate level of force under DP 1.04.

The use of a bicycle to push back a crowd is no different than the use of a baton to push back a crowd.

A bike officer must maintain control of their police bike. They must not let the bike be taken or used against them. This leaves officers with limited force options other than the bicycle when holding or moving a line.

The use of police bikes in this manner is a reasonable and widely-used tactic. Additionally, follow cars have become a necessity after Charlottesville when a suspect drove through a protest in a malicious attack. https://en.wikipedia.org/wiki/Charlottesville_car_attack

Vehicle attacks have spiked over the last 12 months. Thirty-nine people were charged across the country with maliciously hitting protestors with their vehicles.

<https://www.usatoday.com/story/news/nation/2020/07/08/vehicle-ramming-attacks-66-us-since-may-27/5397700002/>

The purpose of follow-cars is to control vehicular traffic and prevent accidental and intentional physical harm to those exercising their First Amendment rights.

Part III: Recommendations with Operational or Legal Challenges

CPP provided some recommendations that are operationally or legally problematic for SDPD.

CPP Recommendation – Mutual Aid:

“Require that if outside law enforcement agencies participate in City of San Diego protests under mutual aid agreements, such outside agencies should be subject to SDPD policies and procedures.”

SDPD response:

Every agency is responsible for its own employees and enforcement of its policies and procedures. SDPD has no authority to discipline any officer/deputy from another agency.

CPP Recommendation – Rights of Legal Observers:

“Add a new section that addresses the status and rights of legal observers and/or non-participants. Legal observers should be clearly identified and shall not be specifically targeted by officers.”

SDPD Response:

POST does not provide any guidance on this topic, and this is a developing area of law.

Until there is a published legal opinion or guidance from POST, SDPD must rely upon existing law. Sections governing unlawful assembly, riot, rout, and dispersal orders do not provide any special considerations for “non-participants” or “legal observers.”

By being present at an unlawful assembly/rout/riot, a person becomes a participant in the event. *In re Wagner*, 119 Cal. App. 3d 90, 103 (1981) states: “If it were necessary that each member of

an unlawful assembly commit an unlawful act before that member could be convicted, then there would be no necessity to make participation in an unlawful assembly a crime.”

Officers must assess their actions and responses according to individual citizen conduct. Officers should not specifically target anyone except for those engaged in criminal conduct.

It is incumbent upon officers to exercise sound judgment based upon specific articulable facts.

CPP Recommendation – Passive Resistance:

“We do not believe those individuals exhibiting “passive resistance” should be subject to the use of “impact weapons, impact weapon control holds, pain compliance or pressure points” which would technically be permitted under the existing Use of Force Matrix per 1.04. “

SDPD Response:

This issue has been litigated in *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994). These techniques are minimally-invasive, lesser controlling force options that result in temporary discomfort.

Without these methods, there are virtually no other ways of addressing passively resistant individuals refusing to obey a lawful order. Arrestees are legally obligated to comply with lawful arrests. See California Penal Code section 834a.

CPP Recommendation – Reasonable Time to Disperse:

“Define ‘a reasonable time.’ The procedure needs to be clear as to what a reasonable time is for a crowd to disperse. We propose this time be not less than three minutes.”

SDPD Response:

The courts have consistently used the “reasonableness” standard. The courts have never imposed a time limit. Moreover, nothing in the POST guidelines references any sort of specific timeline.

SDPD must also be mindful not to establish “three minutes” as an absolute standard. Many times, more than three minutes is appropriate. During exigent circumstances, such as extreme violence, rescue, extrication, etc., three minutes may be unreasonable and dangerous.

CPP Recommendation – Flex-Cuff Identification:

“Officers shall write their ID number on the flex-cuffs of each individual they take into custody. Officers shall mark the flex-cuffs indicating initial placement to assist in visually observing if flex-cuffs unexpectedly tighten.”

SDPD Response:

As noted below, the Department recognizes the legitimate concerns about the use of flex-cuffs to restrain persons. However, writing ID numbers onto a set of flex-cuffs would likely be impractical during the chaotic reality of an unlawful assembly situation. Additionally, Officers would have to have the means (e.g., permanent marker) with them at all times when using flex-cuffs to write their names and mark the “notch” of the cuffs, and the texture of flex-cuffs results in the markings smearing and becoming illegible.

Additionally, the marking of the flex-cuffs may indicate if the flex-cuffs tightened after application, but it does not remove the obligation of the officer to check the tightness of the flex-cuffs per DP 4.17 as detailed in section IX.C.5 of the current procedure:

- c. All persons subject to arrest during a demonstration or crowd event shall be handcuffed per Department Procedure 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures.
- d. Officers should be cognizant that flex-cuffs may tighten when arrestees' hands swell or move, sometimes merely in response to pain from the cuffs themselves.
- e. Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. **When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.**

CPP Recommendation – Incident Commander:

“Require officers to provide the name and ID number of the incident commander.”

SDPD Response:

Incident commanders may change throughout an event. Members of the public can file a complaint, even anonymously, and IA will determine who the commander of record was at the time of the complaint.

CPP Recommendation – Specialty Munitions:

“In the section regarding the use of specialty munitions, list options to be utilized in order of escalation by munition type as well as have clear and significant descriptions as to when and how they are utilized, handled and removed.

40 mm foam baton rounds should be utilized only as a last resort.

CS gas grenades and rubber sting balls need to have clear and explicit references as to when use is permissible.”

SDPD Response:

These concepts are covered in both DP 4.17 and DP 1.36 – Use of Specialty Munitions.

DP 4.17 section IX.C.3.c states:

Use of Specialty Munitions – Use of specialty munitions shall comply with Department Procedure 1.36. Generally, munitions 1-4, listed below, may be used while on the line and should be a coordinated effort directed by an Incident Commander. Munitions 1-4 may generally be used in coordination with the SWAT Munitions Team. Authorization for munitions 5 and 6, listed below, shall be obtained by an Assistant Chief level officer and carried out by the SWAT munitions Team Leader

1. OC spray (Oleoresin Capsicum)
2. 40 mm foam baton rounds
3. Pepperballs (OC)
4. Flashbangs
5. CS gas grenades
6. Rubber Sting Balls- defensive maneuver for law enforcement personnel when faced with overwhelming aggression placing officers in immediate physical risk of serious bodily injury or death. This directive does not prohibit officers' abilities to use appropriate force options to defend themselves or others as defined in Department Procedure 1.04.

Conclusion:

The San Diego Police Department has carefully considered every recommendation made by CPP and views this response as part of a process. We look forward to meeting with CPP to provide additional details, answer questions, and further explore these recommendations.

Respectfully,

Captain Jeff Jordon
Special Projects/Legislative Affairs



**RECRUITMENT OF
A PERMANENT
EXECUTIVE
DIRECTOR FOR THE
COMMISSION ON
POLICE PRACTICES**



PURPOSE

- Review the work of creating a process for the recruitment of the Commission's Executive Director
- Identify next steps in the recruitment process.



THE MEMBERS ARE:

**DENNIS W. BROWN-
CHAIR**

**LUPE DIAZ
CLOVIS HONORE
DARLANNE HOCTOR
MULMAT
JAMES JUSTUS**



APPROVED PLAN

- The process will start with the Commission hiring a search firm to do a national search.
- The Commission and Community members will inform the search firm of the qualifications and qualities expected of the Executive Director.
- The search firm will develop and distribute a brochure for the City's website, government jobs.com, NACOLE, and other agencies.
- The search firm will complete an initial evaluation of candidates and provide a short list of candidates , along with a summary of all those who applied , if allowed legally.
- The search firm, with the Commissions collaboration, will develop interview questions to be consistently asked of all interviewees.
- The Commission will identify a panel of individuals consisting of Commissioners and community members to conduct the first round of interviews, with search firm representatives providing technical support.
- Finalists will be recommended by the panel to a CPP Ad Hoc Committee consisting of As Hoc Personnel Committee members and the CPP Cabinet.
- The Ad Hoc Hiring Committee will conduct the final interviews and send the recommended candidate(s) to the City Council for approval.

REVISED PLAN

- Because Measure B states that the Executive Director is appointed by the City Council, we were advised that our plan could not be executed as planned.
- Instead, the City Council created an Ad Hoc Personnel Committee that includes two members of the of the Council's Public Safety Committee (Marne Von Wilpert and Raul Campillo) and the four members of the CPP Ad Hoc Personnel committee.
- The proposed search firm was eliminated, and the screening of candidates was done by 2 commissioners, the City's Talent Acquisition Manger and staff and the Interim Executive Director.
- All signed confidentiality agreements.
- 36 candidates submitted applications. The review committee, in consensus, identified 6 candidates that met the qualifications designated qualifications.



COMMUNITY FORUM AND SURVEY INPUT

- A Community Forum was held on March 16. It included discussions focused on questions of qualifications, qualities and priorities.
- Surveys were distributed for a 3-week period with the same questions
- Review of notes and survey results drove the first round of interview questions.

Questions focused on:

- Qualifications and Experience
- Transparency
- Community Engagement
- Management Skills
- Building a New Model of Oversight
- Relationship with Law Enforcement
- Leadership



INTERVIEW OF CANDIDATES

- An interview panel was identified that consisted of members of the diverse communities of San Diego. They were:
 1. Itzel Maganda Chavez
 2. Francine Maxwell
 3. Nicole Murray Ramirez
 4. Andrea St. Julian
 5. Alex Villiafuerte

Each member signed confidentiality agreements.

Each candidate was interviewed by video conference; each was given 45 minutes to complete their interview.

Each interviewee was asked the same questions in the same way with no alterations.

The panel then made recommendations to the Council Ad Hoc Committee for the Selection of the Executive Director of the Commission for Police Practice.



NEXT STEPS

1. The City Council Ad Hoc Committee et. al, will interview the remaining candidates and make recommendations of finalist
2. The San Diego City Council will interview the finalists in closed session.
3. The Executive Director will be announced in Open Session.



THANK YOU

Dennis W. Brown

City of San Diego Commission on Police Practices

COMPLAINT ADMINISTRATION PROCEDURE

DRAFT

The following shall provide a framework for the receipt, screening, review, investigation, reporting on, and disposition of complaints regarding alleged conduct by members of the San Diego Police Department (the Police Department).

It is the policy of the Commission on Police Practices (Commission) to encourage persons who have complaints concerning the conduct of police officers employed by the Police Department to bring complaints to the attention of the Commission. The Commission will attempt to assist and accommodate Complainants regarding the Complaint filing process consistent with the California Penal Code sections 832.5 and 832.7. Complaints shall include complaints received from any person without regard to age, citizenship, residence, criminal record, incarceration, or any other characteristic of the complainant.

Complaints will be screened, reviewed, and investigated (where appropriate), and disposed of in accordance with the procedures set forth in this procedure. The Commission will make every effort to consider and to respond to Complaints against police officers and investigate, when necessary.

The right of a complainant to bring a complaint shall be absolute and unconditional. The reluctance of the complainant to prepare a complaint form shall not impair the right to lodge a complaint.

Lodging and Filing of Complaints

A complaint can be filed by an impacted party¹, a parent or legal guardian if the impacted party is a minor, a witness to an incident, any person with knowledge of an incident, or a third-party representative for an impacted party. The Commission will accept complaints from anonymous complainants, however, the extent of Commission screening and action on such complaints may be limited.

Complaints may be lodged with the Commission online, in writing, in person, by telephone, email, or any other means deemed appropriate by the Commission. The Commission will also receive complaints filed with the Police Department, which must be transmitted to the Commission within five (5) days of receipt. Conversely, within five (5) days from receipt, Complaints received by Commission shall be forwarded to the Police Department.

The Police Department will provide a response as to the classification of each complaint forwarded to the Police Department by the Commission within seven (7) days of receipt. The Police Department will also provide a monthly status update on all complaints forwarded to the Police Department by the Commission and all Police Department investigations of alleged police misconduct, including internal investigations not resulting from a complaint, as well as officer involved shooting incidents, deaths in-custody, and deaths resulting from interactions with a police officer. According to the City of San Diego Municipal Code §26.1107(a)(6), if the Police Department investigation is not concluded within six months, the Police Department must provide a written report to the Commission on the status of the investigation every two weeks

¹ Impacted party is a person directly affected by at least one or more allegation(s) or instances of police misconduct.

thereafter, until the investigation concludes. The Commission and Police Department must establish an efficient and transparent joint system allowing the two entities to mutually track complaints and matters referenced herein.

Upon receipt of the complaint, Commission staff shall screen the complaint for relevant information and make a jurisdictional assessment. Irrespective of the mode of filing of the complaint, Commission staff will make every effort to obtain a signed attestation form from the complainant or impacted party. If such form is not obtained within five (5) days and the complaint is or may be within the Police Department jurisdiction, the complaint will be forwarded to the Police Department for further assessment and action. Commission staff will make best effort to refer complainants to appropriate agencies/jurisdictions if the complaints are not within the Police Department or Commission jurisdiction.

As part of the screening process, staff will bring complaints to the attention of the Chief Investigator and/or Executive Director, who will then follow the procedure outlined in the Investigations Operating Procedure to properly classify and determine whether to initiate an independent Commission investigation. If a complaint is deemed appropriate for Commission's investigation but a complainant or impacted party does not provide a signed attestation form, Commission's action on such complaint may be limited and it may elect not to move forward with an investigation, pursuant to provisions outlined in the Investigations Operating Procedure.

Forms

The Commission shall establish standard forms related to the complaint administration process, including but not limited to complaint form, attestation form, verification form, medical records release form, unsealing orders, and other to be signed by parties who file complaints or are parties to the Commission's investigation. The attestation form shall be in compliance with the California Penal Code section 148.6, as required by law. All forms shall be available in other languages as deemed appropriate by the Commission. Complaint form shall be available on the Commission's website, at the Commission's office, and at public meetings or outreach events of the Commission.

Recording of Complaints

The Commission will maintain a central register of all complaints filed with it. The central register shall record actions taken on each complaint. Disclosure of information from the central register shall be in compliance with applicable law. The central register shall contain the following:

1. name of the complainant, impacted party, witnesses, and subject and witness officers;
2. Commission assigned complaint number;
3. the Police Department assigned case number (if applicable);
4. date the complaint was filed;

5. a brief description of the subject matter of the complaint;
6. date the complaint was transmitted to the Police Department;
7. classification of the complaint;
8. date the investigation commenced, if applicable;
9. investigative actions taken by Commission investigators;
10. date of the completion of the investigative report and the investigation findings;
11. date and content of the final disposition of the complaint.

Withdrawal of Complaints

A complaint may be withdrawn from further consideration at any time by a written notice of withdrawal signed and dated by the complainant, indicating that they do not want to proceed with a formal investigation. In cases where multiple complainants exist, and one or more do not withdraw, the Commission may proceed with the investigation.

Notification of Parties

Within ten (10) business days of the receipt of a complaint, the Commission will notify a complainant by telephone, email, or mail using the information provided when the complaint is filed that the Commission has received the complaint and its status.

If the Commission decides to investigate the complaint, the Commission must identify the case number and Commission staff assigned to investigate the case and provide this information to the complainant and/or impacted party.

The complainant, impacted party, or subject officer, may check on the status of the case at any time. However, the Commission must provide a notice to complainants and/or impacted parties on the status of their investigations no less than every 45 days.

After the Commission makes its final finding, the Commission will notify the complainant, impacted party, and the subject officer of the outcome within seven (7) days of the Commission vote on the case or other Commission action.

Third-party complainants shall not be provided with confidential information pertaining to the impacted party or as otherwise prohibited by law.

City of San Diego Commission on Police Practices

PITCHESS MOTION PROCEDURES

Motions to Discover Confidential Police Files and Records

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Commission on Police Practices on Confidentiality of Police Records

It is required that the Commission on Police Practices (Commission) maintain the confidentiality of police personnel records, complaints against San Diego Police Department (Police Department) officers and information obtained from these complaints or records. Police personnel records that are in the possession of the Commission or its staff, are confidential and shall not be disclosed to any member of the public, including the complainant, except in accordance with applicable law.

Copies of police personnel records and complaints of the Commission shall be made available to the Police Department, unless prohibited by applicable law.

The disclosure of information, including but not limited to, the identification of subject officers, complaints under review or investigation, public documents, and other reports shall also be in compliance with applicable law.

Discovery of Police Officer Personnel Files

For many years this discovery process was allowed only in cases where a defendant alleges that he acted in self-defense against an officer who used excessive force against him. Over the years, the courts have expanded on the scope of alleged police misconduct that would justify intrusion into the confidential personnel files of peace officers. Potentially acceptable allegations in support of Pitchess discovery may now include lying and falsifying police reports, planting and fabricating evidence, ethnic, racial, and sexual orientation bias, coerced confession, “code of silence” and others. Such discovery is based on the Supreme Court’s holding in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

The most common Pitchess motion seen today occurs in criminal cases, and challenges what the officer has reported in his official police report, or that the officer lied, planted, or fabricated evidence, prepared a false police report, or engaged in a pattern of misconduct. Defendants may seek complaints against *any* officer who was involved in, present during or investigated his arrest, or who prepared a report relating to the arrest/investigation.

Requests are made to the court to search an officer’s confidential personnel files for prior complaints against the officer for unlawful arrest, excessive force, false testimony, fabrication of evidence, planting evidence, false police reports and the like. Defendants seek greater access to officer files and, over objections, may seek the internal investigation reports from the Police Department and the Commission, including witness statements, compelled statements of the officers provided to investigators, photographs, audio- and videotapes, and sometimes psychological testing results. Other related reports and documents prepared, or maintained, by the Commission may also be subject to discovery motions in a criminal or civil context.

The majority of law in this area focuses on criminal discovery; however, the Pitchess process is equally applicable in civil cases – most commonly police misconduct litigation. By ordinance, the Commission must handle and litigate subpoenas and Pitchess motions seeking discovery. Discovery of confidential police personnel records maintained by the Commission may be sought to prove a pattern and practice of police misconduct, or that the Police Department was

made aware of a problem officer and failed to act on the information or recommendation by the Commission.

Most importantly, police officer personnel files are often sought in high profile cases and officer involved shootings in federal criminal and civil rights cases. State law privileges of confidentiality are not recognized in cases in which federal rights or federal civil rights are litigated. The federal courts afford these state law privileges some weight, and federal common law may be applied. The role of the Commission General Counsel, or outside counsel, in these matters should be to represent that the Legislature and courts have provided laws to ensure that courts engage in a fair, balanced, and thorough review of the need for this discovery, while balancing an officers' rights to confidentiality in their personnel records.

Background for Police Discovery or Pitchess Motions

Police officer personnel discovery and the Pitchess motion process is codified under various California Statutes.

Evidence Code §§1043-1047 enumerate the discovery process. Evidence Code §1043 states:

(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

(b) The motion shall include all of the following:

(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

(2) A description of the type of records or information sought.

(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

Evidence Code §1045 states:

(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

(b) In determining relevance, the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:

(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment, or oppression.

(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

Evidence Code §1046 provides:

In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility.

Evidence Code §1047 provides:

(a) Records of peace officers or custodial officers, as defined in Section 831.5 of the Penal Code, including supervisory officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct at issue is alleged to have occurred within a jail facility, shall not be subject to disclosure.

(b) Notwithstanding subdivision (a), if a supervisory officer whose records are being sought had direct oversight of a peace officer or a custodial officer, as defined in Section 831.5 of the Penal Code and issued command directives or had command influence over the circumstances at issue, the supervisory officer's records shall be subject to disclosure pursuant to Section 1045 if the peace officer or custodial officer under supervision was present during the arrest, had contact with the party seeking disclosure from the time of the arrest until the time of booking, or was present at the time the conduct at issue is alleged to have occurred within a jail facility.

The California legislature has codified the balancing doctrine created in the *Pitchess* decision by enacting Penal Code §§ 832.7, 832.8 and Evidence Code §§1043 and 1045, all of which established an “exclusive” procedure for the discovery of peace officer personnel records or information contained in them. Penal Code §832.5 was also amended in 1978 to include a requirement that police complaints be maintained for a period of five years. The purpose of these bills was to both require retention of police personnel investigation files and records, but also to protect them from “random discovery” and dissemination. (*San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189-190, referencing the analysis of Senate Bill No. 1436 prepared for the Assembly Committee on Criminal Justice.) “In enacting [Evidence Code] sections 1043 and 1045, the Legislature clearly intended to place specific limitations and procedural safeguards on the disclosure of peace officer personnel files which had not previously been found in judicial decisions.” (*California Highway Patrol v. Superior Court* (2000) 84 Cal. App. 4th 1022.)

Bringing a Pitchess Motion

Penal Code § 832.7 states the basic premise that peace officer personnel records and records of citizen complaints, “. . . or information obtained from these records . . .” are confidential and “shall not” be disclosed in any criminal or civil proceeding except by discovery pursuant to Evidence Code §§1043 and 1046. Penal Code §832.8 defines “personnel records” to include personal data, medical history, appraisals and discipline, complaints and investigations relating to an event an officer perceived and/or relating to the manner in which their duties were performed, and any other information the disclosure of which would constitute an unwarranted invasion of privacy. In essence, any file maintained by the Commission under an officer’s name becomes a part of that officer’s personnel file subject to the confidentiality and discovery provisions of the above provisions.

Evidence Code §1043 sets out the basic requirements for a discovery motion seeking personnel files or records. The motion must be a court written motion noticed according to the

requirements of CCP §1005. The notice requirements are mandatory. “No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section, except upon a showing by the moving party of good cause for non-compliance, or upon a waiver of the hearing by the government agency identified as having the records.” (Evidence Code §1043(c).) If there are allegations of the use of excessive force by the officers, the motion must also include a copy of the police report per Evidence Code §1046. The motion must be served on the agency having custody and control of the records, whether the CPP or SDPD and the officer must be given notice of the motion by the CPP or SDPD, even if s/he no longer works for the agency. (*Abatti v. Superior Court* (203) 112 Cal.App.4th 39.)

Assembly Bill (AB) 1600 took effect on January 1, 2020, and shortens the filing timelines for Pitchess motions in criminal matters. In addition, the personnel records of supervisory officers are potentially discoverable. Prior to the passage of AB 1600, Evidence Code §1403 required that a criminal defendant file written notice of a Pitchess motion at least 16 court days before hearing. AB 1600 amended this provision to allow a Pitchess motion in a criminal matter to be filed as little as 10 court days before the hearing.

Moreover, Pitchess motion opposition by the Commission must now be filed no less than five court days before hearing and reply papers must be filed no less than two court days before hearing. Court holidays and weekends do not count as "days" for the purposes of these timelines. The timelines for Pitchess motions in civil matters remain unchanged.

An important change made by AB 1600 is in regard to discovery of personnel records of supervisory officers. Before the enactment of AB 1600, Evidence Code §1047(a) prohibited the disclosure of personnel records of supervisory officers or other peace officers or custodial officers who were not present during the arrest, had no contact with the party seeking disclosure from the time of arrest until the time of booking, or who were not present at the time the conduct at issue occurred within a jail facility. In efforts to expand accountability, AB 1600 added an exception to this rule. The personnel records of a supervisory officer who had direct oversight of a peace officer or custodial officer and who issued command directives or had command regarding the circumstances at issue are discoverable if the supervisory officer was supervising a peace officer or custodial officer who: (1) was present during the arrest, (2) had contact with the party seeking disclosure from the time of arrest until booking, or (3) was present at the time the alleged conduct occurred within a jail facility.

Senate Bill 1421, effective on January 1, 2019, rendered personnel records related to officer misconduct disclosable pursuant to the California Public Records Act. (See below.)

Senate Bill 1421

Senate Bill 1421 makes a Pitchess motion unnecessary for some types of information requests. Under SB 1421, four types of police records are now open for public inspection. In general, these records pertain to:

1. Officer-involved shootings;
2. Use of force resulting in great bodily injury;

3. Where an officer commits sexual assault;
4. Where an officer commits an act of dishonesty, perjury, destroys evidence or files a false report.

In the four scenarios above, SB 1421 authorizes the public inspection of “records” found in an officer’s personnel file. Such “records” may include such items and information as:

1. Investigative reports;
2. Photographic, audio and video evidence;
3. Transcripts or recordings of interviews;
4. Autopsy reports;
5. Documents setting forth findings or recommended findings; and copies of disciplinary records.

Even after Senate Bill 1421, Pitchess motions are still necessary if a defendant seeks information from an officer’s personnel file; and the information is not authorized for inspection under SB 1421. Examples of information a defendant may seek through a discovery motion that is not covered within SB 1421 may include:

1. Records that show that an officer racially profiled an individual; or,
2. Records that show that an officer used excessive force;
3. Records that show that an officer coerced a confession; or
4. Records show other prejudicial acts, or the falsification of evidence/testimony.

Defense attorneys often argue that police records – in particular an officer’s personnel file – serve a very important source for relevant evidence. In particular, criminal defendants desire to ascertain whether an arresting officer committed some type of misconduct in past cases. A showing of any pattern or practice of misconduct is arguably critical to build an effective defense.

Even where certain records are subject to disclosure, Senate Bill 1421 states that some information must get redacted, or edited, to protect the identity of certain parties and witnesses. The information that gets redacted includes, but is not limited to:

1. Personal information (e.g., addresses, telephone numbers, and names of family members);
2. Confidential medical or financial information;
3. Information protected from disclosure under federal law;
4. Information the disclosure of which would create a danger to an officer’s safety; and,
5. Information where the public interest served by not disclosing it outweighs the public interest served by disclosing it.

The Pitchess Motion Procedure

California Evidence Code §§1043 and 1045 outline the process for filing a Pitchess motion. The process essentially includes three important elements. These are:

1. Procedural steps for filing the written motion as outlined under Evidence Code §1043;
2. A showing of “good cause;” and,
3. An “*in camera*” or in chambers private hearing with the judge, Commission custodian of records and a court reporter.

Under Evidence Code §1043, a Pitchess motion must include:

1. Identification of the criminal court case, the defendant, or the officer(s) whose records are being sought, and the governmental agency that has custody of the records;
2. A description of the type of records that are being sought;
3. Proof that the defendant has notified the agency that holds the records of the motion and proof of service upon the Commission and subject officer; and
4. An affidavit or declaration establishing good cause for discovery or invasion into the police officer’s personnel file.

The affidavit or declaration demonstrating “good cause” is the most important part of a California Pitchess motion. The person seeking to compel discovery has the burden of proof in the discovery proceeding. A showing of “good cause” exists if the affidavit sets forth both:

1. A specific factual scenario demonstrating the relevance and need for discovery in juxtaposition to the defendant’s case; and
2. The reasons why the subject discovery would be relevant in the defendant’s case.

Motions to Quash Subpoenas for Records Served on the Commission

Many times, attorneys for criminal defendants or litigants try to access records by issuing a subpoena duces tecum. Although such subpoenas are appropriate in certain instances, they are not necessarily dispositive when seeking police records in state court. Where such subpoenas are issued to the Commission, it may be necessary to file a Motion to Quash the subpoena. Appendix A contains a sample notice and motion to quash the subpoena in a criminal setting. Appendix B contains a sample motion to quash in a civil lawsuit.

The motion to quash is appropriate since access to such records in state court may only occur to the provisions of the public records action under Penal Code §832.7 as discussed above, or pursuant to a noticed Pitchess motion.

Required Notice to the Officer where a Pitchess Motion is Filed

Where police discovery is sought by subpoena or a Pitchess motion, the Commission must provide notice to the subject officer and the Police Department. A copy of the subpoena or discovery motion should also be provided to the officer. See the sample notice attached under Appendix C. It is not required that the officer attend the court proceeding but notice of the same is a prerequisite in the discovery process.

Opposition to the Pitchess Motion

Appendix D contains sample boilerplate opposition pleadings to a Pitchess or discovery motion in state court. Arguments of over breadth, relevance, failure to establish good cause may be argued.

It should be noted that the Pitchess process does not apply in federal court. Access to records is broader and less protected in federal court. Nevertheless, the same or similar arguments and objections to disclosure should be raised and argued as necessary. In addition, federal discovery may be broader than in state court, and it might be necessary to consider the preparation of a privilege log and/or request an *in-camera* review of records before the U.S. District Court Judge or Magistrate Judge.

In many instances, litigants seek information broader than names and addresses of complaints. Requests are often made for investigator notes, findings, and conclusions. Such requests may be argued to be overbroad and beyond the scope of discovery under the Penal Code in a criminal matter, where conclusions of investigators may be excluded from discovery under the Penal Code. Arguments should be made to refute the requests for discovery into a police officer personnel file and personnel records to preserve the integrity of the Commission's ability to conduct investigations and to preserve integrity of operations. In this regard, the opposition to the motion should argue the official information privilege afforded under Evidence Code §1040.

The In Camera Hearing

If the above procedural requirements are met, and good cause is demonstrated, then a Pitchess motion moves onto an "*in camera*" or private hearing conducted by a judge. "*In camera*" means that the hearing is private or in the judge's chambers rather than in open court. The only individuals that usually attend are the attorney for the Commission, custodian of records (Executive Director) and a court reporter.

During the *in camera* review hearing, the trial court judge reviews the personnel file and determines whether or not the information in the officer's personnel files is relevant to the defendant's defense. Only information that the judge determines is relevant will be disclosed to the defendant. The judge does not serve as a trier of fact, and consequently does not decide credibility or weigh the evidence.

There are certain types of information that the judge does not disclose to the defendant who files a Pitchess motion (unless the information is clearly exculpatory under *Brady v. Maryland* (1963) 373 U.S. 83, 87). Records that should not be disclosed as a matter of law include:

1. Information about complaints against the officer(s) that occurred more than five years (or the corresponding statutory period for various types of misconduct) before the alleged police misconduct in the defendant's case;
2. The investigative conclusions of internal investigator.

Generally, in state courts, only the names and addresses of witnesses are disclosed. Moreover, if there is good cause, the Commission should request a protective order by the court to keep the information confidential.

Limitations of Disclosure

In criminal matters, records of complaints concerning conduct which occurred more than five years prior to the incident must be maintained and may be subject to disclosure. Records of complaints occurring more than five years prior are not generally subject to disclosure in criminal matters.

However, where the Commission has records that are responsive to a Pitchess motion and are older than five years, it may be required to bring the records to court in the event of an *in camera* review. In *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, the Court held that whether or not this information will be disclosed depends on how much significance the court places on the information as it relates to the subject matter of the litigation that generated the discovery motion. If the significance of the matter is similar to exculpatory information under *Brady v. Maryland, supra*, disclosure of the information may be ordered by the court.

In *City of Los Angeles v. Superior Court*, the Court stated:

Under *Brady, supra*, 373 U.S. 83, 87, the prosecution must disclose to the defense any evidence that is "favorable to the accused" and is "material" on the issue of either guilt or punishment. Failure to do so violates the accused's constitutional right to due process. (*Id.* at pp. 86-87.) Evidence is material under the *Brady* standard "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 682.) Although *Brady* disclosure issues may arise "in advance of," "during," or "after trial" (*United States v. Agurs* (1976) 427 U.S. 97, 107-108), the test is always the same. (*Id.* at p. 108.) *Brady* materiality is a "constitutional standard" required to ensure that nondisclosure will not "result in the denial of defendant's [due process] right to a fair trial." (*Ibid.*)

Because the *Brady* rule encompasses evidence "known only to police investigators and not to the prosecutor," it is incumbent upon the prosecutor to learn of any favorable evidence "known to the others acting on the government's behalf in [a] case, including the police." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438; see *In re Brown* (1998) 17 Cal.4th 873, 879, fn. 3, and cases cited therein.) The prosecution's disclosure duty under *Brady* applies even without a request by the accused; it pertains not only to exculpatory evidence but also to impeachment evidence. (*Strickler v. Greene* (1999) 527 U.S. 263, 280-281; *United States v. Bagley, supra*, 473 U.S. at p. 676; *United States v. Agurs, supra*, 427 U.S. at p. 107.) *City of Los Angeles v. Superior Court*, 29 Cal.4th 1, 7-8 (Cal. 2002).

As discussed above, in civil matters discovery into police records may be broader. Records over five years may be discovered if they are maintained by the Commission and deemed relevant to the litigation. Civil discovery is more liberal in this regard, particularly in federal court.

Findings and Conclusions of Investigators

Conclusions of investigators for the Commission are generally excluded from discovery pursuant to Penal Code §832.5. On the other hand, the Supreme Court held that a department can be required to disclose not only whether discipline was imposed, but what discipline was involved. In *City of San Jose v. Superior Court*, the Court stated:

In using two quite different terms — "discipline imposed" and "conclusions of any officer investigating a complaint" — the Legislature presumably intended to refer to two distinct concepts. If the City's interpretation were correct, the exception provided by subdivision (b)(2) would swallow the rule permitting disclosure as established in subdivision (a), thus rendering that part of subdivision (a) virtually meaningless. We ordinarily reject interpretations that render particular terms of a statute mere surplusage, instead giving every word some significance. (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 [184 Cal.Rptr. 713, 648 P.2d 935].)

The term "conclusions of any officer" denotes the thought processes of, and factual inferences and deductions drawn by, an officer investigating a complaint, concerning such matters as the credibility of witnesses or the significance, strength, or lack of evidence. We see no indication that the Legislature intended the term to include the investigating body's ruling on the complaint or the nature of any discipline imposed. *City of San Jose v. Superior Court*, 5 Cal.4th 47, 55 (Cal. 1993).

Protective Orders

Even where discovery is granted pursuant to a Pitchess motion or discovery motion in federal court, the CPP should seek a protective order from the court confining any discovery to the instant matter at hand. See Evidence Code §1045.

Appendix A
Motion to Quash (Criminal)

Attorneys for the City of San Diego Commission on Police Practices

[Address]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

Defendant.

CASE NO: _____
NOTICE OF MOTION TO QUASH
SUBPOENA DUCES TECUM; POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
DATE:
TIME:
DEPT:

To: The Above Mentioned Defendant and His Attorney:

PLEASE TAKE NOTICE that on _____ in the above-entitled court, the San Diego Commission on Police Practices will move the court for an order quashing the subpoena *duces tecum* heretofore served by the defendant commanding the commission to produce the personnel files of Officer _____.

This motion is made on the grounds that the subpoena was improperly served upon the commission; that the subpoena does not qualify as a written motion justifying discovery under

Evidence Code §1043 and that a “Pitchess” motion requesting discovery of the very items subpoenaed has already been satisfied.

Memorandum of Points and Authorities in Support of Motion to Quash Subpoena *Duces*

Tecum

Defendant _____ has served a subpoena *duces tecum* upon the San Diego Commission on Police Practices custodian of records requesting the production of the police personnel files of Officer _____. (See Exhibit A). The subpoena *duces tecum* was personally served upon the commission on _____.

The records requested by the subpoena are confidential records (P.C. §832.5 – 832.8) and can only be obtained pursuant to a court order following a noticed written motion (Evidence Code §1043) showing good cause for the discovery thereof and setting forth the materiality to the subject matter of the litigation. The subpoena *duces tecum* herein at issue does not qualify under §1043.

I. The Subpoena *Duces Tecum* Did Not Provide Sufficient Notice to the Party in Possession of These Records (Optional Argument)

A subpoena *duces tecum* must specify a date for the production of the records requested which is not less than 15 days from the date the subpoena is issued. [C.C.P. §1985.3(b).] In the instant case, the defendant’s subpoena was issued on _____, and specified the date to produce the documents as _____ (Exh. A). The subpoena *duces tecum* does not qualify under statutory requirements.

Subpoenas which do not comply with statutory requirements have no force or effect. [*Johnson v. Superior Court* (1968) 258 Cal. App. 2d 829, 66 Cal. Rptr. 1341]. Therefore, the defendant's subpoena *duces tecum* should be quashed.

II. A Subpoena Duces Tecum Is Inadequate Unless It Meets Evidence Code §1043

Requirements

A request to produce the personnel records of a police officer is a request for confidential records under Penal Code §832.7. Under §832.7 these records may only be obtained by a written notice motion brought pursuant to Evidence Code §1043 and 1046. The motion must show good cause for the discovery of the records and set forth the materiality of the information to the subject matter of the litigation [see *Pitchess v. Superior Court* (1974 11 Cal. 3d 531, 535-36; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal. 3d 24 and Evidence Code § 1043(b) (3).] In addition, since the defendant is requesting information or complaints contained within these records, Evidence Code §1046 requires him to attach the police report to the motion. The subpoena does not qualify as a noticed motion showing the requisite materiality under Section 1043 and the defendant has not attached the police report as required in §1046.

Conclusion

Based on the foregoing, the City of San Diego Commission on Police Practices respectfully requests this court to quash the subpoena *duces tecum* served upon it by defendant on

_____.

Dated: _____

Respectfully submitted by:

DRAFT

Appendix B
Notice of Motion to Quash (Civil)

Attorneys for the City of San Diego Commission on Police Practices

[Address]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Plaintiff,

v.

SAN DIEGO COMMISSION ON POLICE PRACTICES,
Defendant.

CASE NO: _____

POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO QUASH SUBPOENA
DUCES TECUM

DATE:
TIME:
DEPT:

To: Plaintiffs and Their Attorneys of Record, and to Defendants and Their Attorneys of Record:

The Custodian of Records for the City San Diego Commission on Police Practices (“CPP”) respectfully claims the Evidence Code §1040 official information privilege, and hereby incorporates points and authorities supporting defendants’ motion to quash plaintiffs’ subpoena *duces tecum* and submits these points and authorities.

I. Statement of Case

[Statement of requested materials / describe records requested]

II. The San Diego Commission on Police Practices Is an Oversight Body with Privileges of

Confidentiality

The San Diego Commission on Police Practices (“CPP”) hereby objects to the production of documents responsive to Plaintiff’s subpoena directed to the CPP commanding that it produce: _____

The CPP was created by vote of the citizens of San Diego in 2020 for the purpose of providing civilian oversight of the San Diego Police Department. In summary, the CPP’s statutory duty is to investigate citizen complaints, misconduct, deaths, and discipline arising out of, or in connection with, actions of San Diego police officers in a manner that is transparent, open, and accountable to the public.

The CPP operates within the purview of the public and City Council. The CPP is staffed with City employees and works to investigate and evaluate complaints and incidents in conjunction with the San Diego Police Department. Therefore, CPP is part of the employing agency of police officers employed by the San Diego Police Department and is therefore subject to the disclosure and confidentiality provisions of Penal Code §§ 832.5-832.8, Evidence Code §§1040, 1043-1047 and Government Code §6254. As interpreted by *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272 and *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385, 404-405, the statutory confidentiality of police personnel records also applies to records pertaining to citizen

complaints and investigations, regardless of whether or not they are associated with disciplinary proceedings. As such, these records, and information from the records, are protected from disclosure under Penal Code §832.7 as to “records maintained by any state or local agency pursuant to Section 832.5” and as “personnel records.”

CPP further objects to production of confidential information based on the confidential information privilege afforded under Evidence Code §1040. The documents requested were acquired in confidence by public employees in the course of duty. The request herein is exempt from disclosure absent a court order pursuant to Evidence Code § §1043-1047.

[In federal court, add the following arguments as necessary.]

III. The Official Information Privilege Applies in Federal Court

Federal common law recognizes a qualified privilege for “official information.” The personnel files of City employees are considered official information protected by the qualified privilege. (*Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, 1033.) California recognizes the privilege under Evidence Code §1040 and restricts disclosure of personnel files held by civilian oversight committees where the responsive documents were acquired in confidence by a public employee in the course of duty, deemed confidential and not open to the public prior to the claim of privilege. Such records are exempt from disclosure under Evidence Code §1047.

In addition, federal common law recognizes a qualified “law enforcement investigatory privilege” that protects civil law enforcement investigatory files from civil discovery. (*Scalia v. International Longshore and Warehouse Union* (N.D. Cal. 2020) 336 F.R.D. 603; *N.L.R.B. v.*

Silver Spur Casino (9th Cir. 1980) 623 F.2d 571, 580.) The privilege protects “informal deliberations of all prosecutorial agencies and branches of the government.” (*Id.*) The purpose of the privilege is to “prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses, and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise prevent interference with an investigation.” (*Jones v. City of Indianapolis* (S.D. Ind. 2003) 216 F.R.D. 440, 444, citations omitted.) California recognizes this privilege under Government Code §6254, 6254 (e) [that exempts from disclosure any investigatory or security files for law enforcement purposes and portions of a file that reflect the analysis or conclusions of the investigating officer, and exempts statements made to a governmental agency that agrees to treat the disclosed materials as confidential].)

IV. The Deliberative Information Process Applies to Information Maintained by the CPP

Under State and Federal Law

The “deliberative process” privilege protects the government’s deliberative process, i.e., communications within the CPP leading up to its decision or recommendation. (*Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, 1033.) “The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” (*Hongsemeier v. Commissioner of Internal Revenue* (9th Cir. 2010) 621 F.3d 890, n. 904.) The privilege protects the privacy of governmental officers and assures that deliberations are not inhibited by fear of disclosure concerning what is said. (*Coastal States Gas Corp. v. Department of Energy* (D.C. Cir. 1980) 617 F.2d 854, 866.) In addition, Government Code

§§54957 and 54963 protect information from closed sessions of the CPP from public disclosure consistent with the aforementioned analysis.

In determining federal privilege in a federal case, absent a controlling statute, a federal court may also consider state privilege law. (*Lewis v. U.S.* (9th Cir. 1975) 517 F.2d 236, 237.) The Federal Rules of Evidence, Rule 501 states that “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule or decision.” The CPP contends that one or more state privileges apply in this matter.

Under California Penal Code §§832.5-832.8, California Evidence Code §§1040, 1043-1047 and Government Code §6254, the records that are requested are protected from disclosure. Moreover, as decided by *Copley Press, Inc., v. Superior Court* (2006) 39 Cal.4th 1272 and *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385, 404-405, the statutory confidentiality of police records and information applies to citizen complaints regardless of discipline, and are protected from disclosure under Penal Code §832.7 as “records maintained by any state or local agency pursuant to Section 832.5” and as “personnel records.”

California *Penal Code* §832.8 defines peace officer personnel records as including:

- (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
- (b) Medical history.
- (c) Election of employee benefits.
- (d) Employee advancement, appraisal, or discipline.

(e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties; or

(f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

The records requested constitute confidential records under Penal Code §832.5-832.8. These records may not be accessed outside of the requirements of Evidence Code §1043-1047.

V. The Provisions of Evidence Code §1043, Which Governs Discovery or Disclosure of Peace Officer Personnel Records, Have Not Been Met

Plaintiffs have filed with this court a subpoena *duces tecum* for the records referenced above, including a purported justification for disclosure. The Evidence Code, however, contemplates a noticed motion in any case in which peace officer's personnel records are sought. Evidence Code §1043 reads as follows:

(a) In any case in which discovery or disclosure is sought of peace officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon which notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon

receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

(b) The motion shall include all of the following:

- (1) Identification of the proceeding in which discovery or disclosure, the party seeking discovery or disclosure, the peace officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.
- (2) A description of the type of records or information sought.
- (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

As may be noted from the wording of subsection (a) of the statute itself, §1043 applies in any case in which discovery or disclosure is sought of peace officer personnel records, and not only in the typical "Pitchess" situation in which a criminal defendant seeks discovery of citizen complaint records required to be maintained by the custodian of records pursuant to Penal Code §832.5. In addition, Penal Code §832.7 specifically provides, in relevant portion, that:

(a) Peace officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of police officers or police agency conducted by a grand jury, a district attorney's office, or the attorney general's office.

Section 1043 of the Evidence Code further provides that the party seeking discovery or disclosure of peace officer personnel records must file a written motion with the appropriate court or administrative body upon fifteen (15) days written notice to the governmental agency, which has custody and control of such records.

Section 1043 also sets forth what shall be included in a motion, seeking discovery of personnel records and sets forth specific requirements for the documents required to be submitted in support of the motion for discovery. The statute specifically requires that a motion be made, and it is respectfully submitted that a subpoena *duces tecum* cannot justify disclosure of the records.

Further, in the case of a record which is compiled without a person's consent, or with his consent because of some legal requirement and where the subject of the record has a right that access to that record be restricted, *the relationship between the custodian of the record and the person who is the subject of the record is analogous to that of attorney client.* (Emphasis added.)

The custodian has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted.

Craig v. Municipal Court (1979), 100 Cal.App.3d 69, 161 Cal.Rptr. 19, 23. The custodian, therefore, has both the standing and the affirmative obligation to appear and be heard in a matter involving access to peace officer personnel records.

Confidentiality considerations are equally applicable whether a criminal defendant or, as here, a plaintiff in a civil action, seeks disclosure of the record.

The custodian of records is not attempting to indulge in judicial gamesmanship or in any way to harass or inconvenience any of the parties herein but does have an affirmative obligation to release personnel records only in conformity with the laws of the state of California, laws which are particularly clear and direct on this issue.

VI. Conclusion

The custodian of record for the San Diego Commission on Police Practices respectfully submits that the provisions of California Evidence Code §1043 must be met prior to any further proceedings relating to the discovery or disclosure of the peace officer personnel records sought in this proceeding. When the requirements of the Evidence Code procedures for discovery are not met, no legal basis for the issuance of plaintiff's subpoena *duces tecum* or for compliance with its demands exists.

Dated: _____

Respectfully submitted,

DRAFT

Appendix C

Commission on Police Practices Notification of Pretrial Discovery Motion

To: Commanding Officer, _____ (Area/Division)

From: Commission on Police Practices Executive Director

CONCERNED OFFICER: _____ Serial NO: _____

Pursuant to Evidence Code §1043(a), notice is given that a discovery motion has been filed in the below case and will be heard in the court indicated below. The discovery motion seeks to discover some or all of the personnel or internal affairs records which the San Diego Police Department maintains on the above officer's employment.

CASE NO: _____ DATE OF HEARING: _____

CASE NAME: _____

ATTORNEY AND/OR PERSON REQUESTING: _____

COURT: _____ TIME _____

LOCATION: _____

Note: The law does not require that the officer be present at the hearing. If the officer chooses to attend the hearing, it would be on an off-duty basis with no overtime compensation.

Certification by Commission on Police Practices:

I notified the officer of the above Pretrial Discovery Motion on _____ (Date)

In Person/Telephonically/ by Mail

Signature of Executive Director

Signature of Officer

Return original form to:

Commission on Police Practices

[Address]

DRAFT

Appendix D
Opposition to Pitchess Motion

Attorneys for the City of San Diego Commission on Police Practices

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Plaintiff,

v.

Defendants.

Case No.

**COMMISSION ON POLICE PRACTICES
OPPOSITION TO MOTION FOR
PRETRIAL DISCOVERY (PITCHESS);
POINTS AND AUTHORITIES; REQUEST
FOR PROTECTIVE ORDER PURSUANT
TO EVIDENCE CODE § 1045 (D) & (E)**

DATE:
TIME:
DEPT:

TO COURT:

1. INTRODUCTION

The San Diego Commission on Police Practices (“CPP”) hereby objects to the production of documents responsive to Plaintiff’s motion directed to the CPP commanding that it produce:

The CPP was created by the vote of the citizens of San Diego in 2020, for the purpose of providing civilian oversight of the San Diego Police Department. In summary, the CPP's statutory duty is to investigate citizen complaints, misconduct, deaths, and discipline arising out of, or in connection with, actions of San Diego police officers in a manner that is transparent, open, and accountable to the public.

The CPP operates within the purview of the public and City Council. The CPP is staffed with City employees and works to investigate and evaluate complaints and incidents in conjunction with the San Diego Police Department. Therefore, CPP is part of the employing agency of police officers employed by the San Diego Police Department and is therefore subject to the disclosure and confidentiality provisions of Penal Code §§832.5-832.8, Evidence Code §§1040, 1043- 1047 and Government Code §6254. As interpreted by *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272 and *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385, 404-405, the statutory confidentiality of police personnel records also applies to records pertaining to citizen complaints and investigations, regardless of whether or not they are associated with disciplinary proceedings. As such, these records, and information from the records, are protected from disclosure under Penal Code §832.7 as to "records maintained by any state or local agency pursuant to Section 832.5" and as "personnel records."

The CPP further objects to production of confidential information based on the confidential information privilege afforded under Evidence Code §1040. The documents requested were acquired in confidence by public employees in the course of duty. The request herein is exempt from disclosure absent a court order pursuant to Evidence Code §§1043-1047.

[Provide an overview of the motion and facts of the case.]

**2. THE AFFIDAVIT MUST ALLEGE SUFFICIENT FACTUAL ALLEGATIONS IN
ORDER TO SATISFY THE GOOD CAUSE AND MATERIALITY REQUIREMENTS
OF EVIDENCE CODE §1043**

Under Evidence Code §1043, a motion to discover police personnel records must be supported by an affidavit which demonstrate good cause and sets forth the materiality of the requested information. Whether an affidavit shows good cause or materiality depends on the sufficiency of its factual allegations.

The Supreme Court, in *People v. Memro* (1985), 38 Cal.3d 658,682, established a minimum standard for the factual sufficiency of an affidavit. It at least should pinpoint the particular type of police misconduct involved and identify the officers who engaged in the activity.

A motion to discover is addressed to the sound discretion of the trial court. *Pitchess v. Superior Court* (1969), 11 Cal.3d 531,535. Without adequate factual allegations, or a sufficient factual basis, a court is prevented from exercising its discretion in making an independent assessment of good cause. *Wood v. Superior Court*, 166 Cal.App.3d 1138, 1151. Consequently, conclusionary statements of counsel are insufficient. *Memro, supra*, 38 Cal.3d at p. 686.

In the case of *City of Santa Cruz v. The Municipal Court for the Santa Cruz Judicial District* (1989) 49 Cal.3d 74, the court upheld the sufficiency of an affidavit which stated, inter alia, that “...officers ... grabbed [defendant] and handcuffed him. Officers ...then grabbed [defendant] by the hair and threw him down to the ground. One officer then stepped on [defendant's] head, while the other twisted his arm behind his back.” (*Id.* at page 80). Likewise,

in *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, the court required the declaration to set forth a specific factual scenario to establish good cause.

The court must weigh the sufficiency of the factual allegations contained in the affidavit in this case against the standards outlined above as well as those stated in *People v. Memro*.

[Insert paragraphs here regarding the lack of any articulated facts in the motion which support the contention that excessive force occurred during the incident.]

The defendant's declaration did not provide the requisite factual basis. There is no explanation of how, if at all, complaints are material to a defense. As described in the *City of Santa Cruz, supra*, what is also necessary is some discussion of factually how misconduct occurred in the arrest.

What the defendant has failed to set forth is a specific factual scenario that supports his contention that misconduct or harassment complaints, should they exist in the files, are material to the case. (See *City of Santa Cruz, supra* at page 526). Therefore, the affidavit is insufficient to support the plausible justification or good cause required before discovery should be granted. (On the requirement to use facts pertaining to the incident, (see *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 1489.)

The defendant is required, as held in *City of Santa Cruz and Memro, supra* to, to demonstrate to the court facts and not conclusions, what conduct of the officers constitutes improper action. The defendant only alleged that the officers acted improperly, but he has not stated what conduct of the officers leads to that conclusion. This is required for a showing of good cause for the discovery.

While it is also true the police report was attached, it alone cannot serve as the basis of a sufficient showing of a factual allegation of police misconduct. In fact, based the police report in context, all of the force used by the officers was justified. **[Briefly state here the reason for the force used on the defendant from the police report.]** Defendant has not shown by declaration that anything different than what is contained in the police report occurred. Additionally, the defendant has not shown, if at all, how he can justify discovery of police records in this matter.

[Use the following insert when the motion for discovery targets records of past dishonesty.]

**3. THE SAME FACTUAL SUFFICIENCY IS REQUIRED WHEN RECORDS OF FALSE
ARREST, FABRICATION OR CHARGES OF DISHONESTY REPORTING ARE
SOUGHT**

A mere showing of theoretical admissibility does not entitle defendant, *ipso facto*, to discovery of the information.

In *City of Santa Cruz v. Superior Court* 190 Cal.App.3d 1669, the defendant, charged with assaulting an officer, moved for discovery of, inter alia, past dishonesty complaints. Defense counsel used facts to support his contention of excessive force in his declaration but made no averments to support his request for records of dishonesty. The trial court denied a review of records of dishonesty because only excessive force was involved in the case. [*Santa Cruz supra*, at p. 1672.]

Counsel's motion is vague, ambiguous, and overboard. Defendant has requested items of discovery without any foundational predicate as to why any of these records would be relevant to the charges in this case. **[Insert here vague requests from the motion, if present. i.e., harassment, improper tactics, etc. if such vague requests are not present, delete entire paragraph.]** Yet, complete disclosure of information from these records is made.

Without any factual support of the false arrest based on dishonesty of any officer at the scene, under case law the relevance and materiality to the subject matter of the litigation has not been shown and the discovery request should not have been granted.

[The following section is always used in an opposition to ensure that the court understands that not all complaints may be relevant to the case.]

4. OVERLY BROAD REQUESTS FOR ALL COMPLAINTS WITHIN A GENERAL CATEGORY ARE NOT SPECIFIC ENOUGH

Under Evidence §Code 1045(a), discovery is expressly precluded unless it is relevant to pending litigation. Overly broad requests overlap into irrelevant areas. Only requests which limit discovery to complaints similar to the misconduct in the pending case are relevant, pursuant to a sufficient factual basis.

In *People v. Memro* (1985), 38 Cal.3d 658, the Supreme Court addressed this issue. The Court stated:

On its face, appellant's request for the identities of all complainants of excessive force was overly broad. Since appellant sought the information to holster his claim of involuntariness in the interrogation setting, only complaints by persons who alleged coercive techniques in questioning were relevant. (*Id.* at p. 685.)

The Court acknowledged that within the general category of “excessive force,” very different and therefore irrelevant, types of complaints are found. Excessive force may include aggressive or non-aggressive, non-physical tactics, verbal abuse, rude display of a weapon, tightening handcuffs, as well as actual physical abuse.

Here, by analyzing the police report, the court can ascertain the factual setting. **[Use the facts from the police report to highlight the specifics of the case and insert here.]** Following *Memro*, and assuming a sufficient declaration or affidavit, the defendant is still only entitled to information from those complaints involving a substantially similar set of circumstances. Any other complaints in the files are irrelevant.

[Use the following paragraph if the motion requests any misconduct complaints, as opposed to excessive force.]

Good cause requires that the materials requested be particularly described “with adequate specificity to preclude the possibility that the defendant is engaging in a fishing expedition.” *Pitchess v. Superior Court, supra* at 538.

Here, the defendant broadly seeks records that are general and non-specific to the issue at hand. Defendant generally requests **[Insert the facts of the broad requests here.]** In essence, the defendant's request is so substantially overbroad as to constitute a fishing expedition, in a manner unlikely to lead to admissible discovery. This aspect alone compels denial of the entire motion on the ground of overbreadth.

**5. INFORMATION IN POLICE OFFICER PERSONNEL FILES IS PRIVILEGED AND
SUBJECT TO DISCOVERY ONLY IN LIMITED CIRCUMSTANCES**

The Defendant/Respondent Commission on Police Practices invokes the official information privilege under Evidence Code §1040 in this proceeding. As the court is well aware, California places a priority on preserving the confidentiality and privacy of police personnel records. *See* California Constitution Article I § 1; Code of Civil Procedure §1798.53; Government Code §6254 and Penal Code §§832.5-832.8.

Police officer personnel files are privileged by Penal Code §832.7 and are protected by the right to privacy. *City and County of San Francisco v. Superior Court* (1981) 125 Cal.App.3d 879, 882.

Record disclosure requires strict compliance with Evidence Code §§1043 and 1045 and should not be casually made. *See Willis v. Superior Court* (1980) 112 Cal.App.3d 277, 296-97. The court stated in the *City of Los Angeles v. Superior Court* (1973) 33 Cal.App.3d 778, that the examination of all information concerning a Police Officer, in the possession of the Police Department, would frustrate the purpose of maintaining those personnel records:

"The members of a police department must be able to rely upon the confidential records and notations being preserved for their internal use... or if it were otherwise, the knowledge that some of the confidential information recorded might be later exposed to outside parties would have a certain and chilling effect upon the internal use of such record making. *Id.* at 875.

Penal Code §832.7 in relevant part states:

Peace officer personnel records and records maintained pursuant to §832.5 [citizen complaints), or information obtained from such records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to §1043 of the

Evidence Code. This shall not apply to investigations or proceedings concerning the conduct of police officers or a police agency conducted by a grand jury or a District Attorney's Office.

It is evident that the State of California legislature and courts have placed a priority in preserving the personnel records of a police officer. A strong showing of relevancy value must be shown by the individual seeking to set aside the privilege. In this case, much of the Declaration is based on nothing other than mere conclusory language.

6. THE DEFENDANT OFFERS NO ADMISSIBLE EVIDENCE TO SUPPORT A SHOWING OF GOOD CAUSE FOR COMPLETELY UNNECESSARY ITEMS

As noted herein, Evidence Code §1043 (b)(3) expressly provides that any motion for discovery of confidential police/sheriffs' personnel records shall include records and "affidavits showing good cause for the discovery or disclosure sought." Despite that, nothing in the Declaration establishes "good cause" and/or the required *specific factual scenario of police officer misconduct that is plausible when read in light of the pertinent documents*.

As a clear indication of the "fishing expedition" nature of this motion, the Defendant basically asks for citizen complaints regarding acts of excessive force, unnecessary acts of aggressive behavior, acts of violence, acts of attempted violence, acts of excessive force or attempted excessive force, lack of credibility, falsifying police reports, prior acts of moral turpitude, illegal search and seizure, prior law enforcement employment, discipline imposed, any and all reports, any and all recordings, any and all transcripts, any and all IA's, etc.

The California Supreme Court stated in *People v. Mooc* (2001) 26 Cal.4th 1216, that **not all possible complaints are disclosable** and/or discoverable in any event. Specifically, *Mooc* reaffirms that only those records that are relevant to the pending criminal charges may be

ordered disclosed. An additional order to disclose constitute an abuse of discretion. See *Mooc*, 26 Cal.4th at 1232. "Because the incident is largely irrelevant to a potential claim of self-defense ... the trial court likely would have abused its discretion had it ordered such information." Relevance is not so broadly construed as to embrace any act of misconduct just because it might bear upon the law enforcement officer's character or credibility.

In *People v. Memro*, *supra*, a request for all information concerning complaints of excessive force was deemed overbroad. See *Id.* at 665. "Since (the defendant] sought the information to bolster his claim of involuntariness in the interrogation setting, only complaints by persons who alleged coercive techniques in questioning were relevant." *Id.*; *cf. City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, An officer's failure to report his partner's use of mace cannot be considered constitutionally material to the charge in this case of lewd conduct on a seven-year-old boy.

7. DEFENDANT HAS FAILED TO SHOW GOOD CAUSE AND MATERIALITY FOR THE PRIVILEGED POLICE RECORDS/INTERNAL RECORDS

Evidence Code §1043 provides an actual procedural requirement to obtain such information. Additionally, Evidence Code §1043 states that the defendant must provide:

Affidavits showing good cause for the discovery or disclosure sought setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records. Evidence Code §1043 (b)(3).

Additionally, Evidence Code §1045 provides the guidelines in regard to what is not discoverable by Defendant. This section states that the conclusions of any officer investigating a

citizen complaint is not discoverable. Additionally, until recently, information concerning citizen complaints occurring more than five (5) years before the event of transaction that is the subject of the litigation is not discoverable. This has recently been expanded. This section also states that facts that are **so remote as** to make disclosure of little or no practicable benefits should not be discoverable. Despite arguments to the contrary, this has been reaffirmed by the California Supreme Court in *City of Los Angeles v. Superior Court, supra* at 29 Cal.4th 1. A *Pitchess* motion is insufficient unless it shows "good cause" for discovery and sets forth the materiality of the requested information. Evidence Code §1043 (b). "Good cause" will be shown where the affidavit's allegations are sufficient to the court on notice that information contained in police personnel records or investigation reports is relevant to a triable issue. See *People v. Memro* (1985) 38 Cal. 3d 658, 682.

In addition, the affidavit must also articulate a theory as to how the information will be used in litigating a case. See *Memro* at 682. The theory must explain how the information would lead to admissible evidence under the Evidence Code. See *Memro* at 681. Such is not done by this Defendant, and under these facts and circumstances, such cannot be done.

The showing for materiality is basically the same as for "good cause". Evidence of police officer's conduct must be relevant to a triable issue and be admissible or lead to other admissible evidence on that issue. *Memro, supra* at 38 Cal.3d at 682; see also, *People v. Worthy* (1980) 109 Cal. App. 3d 514, 524.

8. DEFENDANT'S MOTION IS OVERBROAD

If this motion is somehow considered relevant, with the possible sole exception of the Defendant's request for the names, addresses and telephone numbers of prior complainants, the

balance of the requests are improper. *Warrick v. Superior Court* (2005) 35 Cal.4th 1011. But as noted herein, the entire motion and all requests are improper - no statements, reports, notes, etc.

If the Defendant established the necessary "good cause" as to this opposing Respondent, our courts have consistently held that she is then entitled to only the names and addresses of complainants and witnesses, and not the materials defense counsel seeks. *City of Santa Cruz v. Municipal Court* (1989) *supra*, 49 Cal.3d 74; *Kevin L. v. Superior Court* (1976) 62 Cal. App.3d 823, 828.

The Court in *Haggerty v. Superior Court* (2004) 117 Cal. App.4th 1079 specifically reaffirmed the proposition that a criminal defendant is only entitled to the disclosure of the names, addresses and telephone numbers of relevant witnesses. The court stated:

These broad rules permitting discovery of complaint and investigation information are qualified by three specific exceptions contained in section 1045, subdivision (b). Section 1045, subdivision (b) provides that "[i]n determining relevance, the court shall . . . exclude from disclosure: [¶] (1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought. [¶] (2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code. [¶] (3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit." Additionally, section 1045, subdivision (c) states that "In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records."

Haggerty v. Superior Court (2004) 117 Cal.App.4th 1079, 1087-88.

The court further held that the court shall exclude from discovery the conclusions of any officer investigating a complaint in any criminal proceeding. "But this does not mean that in all civil proceedings an investigating officer's conclusions are automatically discoverable. Instead, a court must still undertake the threshold relevance analysis set forth in section 1045, subdivision

(a). Further, section 1045, subdivision (b)(3) states that a court ‘shall’ exclude from disclosure all facts that ‘are so remote to make disclosure of little or no practical benefit.’” *Id* at 1088. Also see *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039 (“As a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead that the agency reveals only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question.” Citing *City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at 81-84); or *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (“Typically, the trial court discloses only the names, addresses and telephone numbers of individuals who have witnessed, or who have previously filed complaints about, similar misconduct by the officer.” Citing *Haggerty v. Superior Court, supra* at 117 Cal.App 4th at 1089-1090.)

Although this discovery or disclosure policy is firmly established in case law and despite the Defendant's assertions to the contrary, the release of only names, addresses and phone numbers was again reaffirmed by the California Supreme Court in the case of *Alford v. Superior Court* (2003) 29 Cal 4. 1033 and in *Warrick v. Superior Court* as noted above.

9. CONCLUSION AND MOTION FOR A PROTECTIVE ORDER

As has been shown above and as can be seen from the moving papers themselves, the motion is defective and must be denied as the Defendant has not established any cause, let alone "good cause" as is required by Evidence Code §1043 for the granting of this motion for any or all the various irrelevant and improper requests as seen in the motion.

The Defendant is clearly on a "fishing expedition" unsupported by any admissible evidence to support a showing of good cause in this matter. This Court is respectfully requested to deny this motion as it is deficient.

If, on the other hand, after an *in-camera* review, this Court deems it necessary to release any of the requested material, assuming any exist, Respondent would request that this Court issue a Protective Order pursuant to Evidence code §1045 (d) & (e) precluding the Defendant from duplicating, copying, or otherwise distributing or disseminating any of the disclosed material or information to anyone, including other criminal defendants.

By way of this Opposition and Motion, Respondent also specifically request that this Court issue a Protective Order under Evidence Code §1045 (d), in addition to the mandated subsection (e).

DATED: _____

Attorney for the Commission on Police Practices